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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
a Colorado corporation,

Appellant,

v.

THE CITY OF GREELEY, COLORADO,
a municipal corporation,
and HOME LIGHT AND POWER COMPANY,
a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, Suite 2440
Denver, CO 80202
(303) 292-1500

Of Counsel

RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th Street, #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

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39 pp

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court's Judgment deprived Poudre Valley Rural Electric Association, Inc. ("Poudre") of its due process right under the Fourteenth Amendment of the United States Constitution to an adjudication by the District Court of the defenses (including Federal Constitutional issues) it had raised to the Complaints in this action?

2. Whether City of Greeley ("Greeley") Ordinance No. 26, 1982 (hereinafter "Ordinance No. 26, 1982") and Article XVIII of the Greeley Charter violate the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, because they stand as obstacles to the accomplishment of the purpose of the Rural Electrification Act?

3. Whether Greeley's 1981 Annexation Ordinances, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter impair (a) Poudre's contract with the State of Colorado created when Poudre accepted the offer in § 38-5-101, C.R.S. by constructing facilities on the highways of the State of Colorado to prepare to serve geographic areas in what became the Greeley target annexation area and (b) Poudre's contract with Home Light and Power Company ("Home Light"), defining the boundaries of the territory which each would be certificated by the Colorado Public Utilities Commission to serve on an exclusive basis, in violation of Article I, § 10 of the United States Constitution?

4. Whether Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter deprive Poudre of the franchise it had obtained from the State of Colorado without due process of law in violation of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 28.1, Poudre states that it has no parent companies, subsidiaries or affiliates. Poudre is a Colorado cooperative electric association incorporated under the laws of the State of Colorado with approximately 17,000 member/customers in Boulder, Larimer and Weld Counties. Poudre in turn is a member of Tri-State Generation and Transmission Association, Inc., a generation and transmission cooperative.

On May 18, 1987, counsel for Home Light and Public Service Company of Colorado advised the Clerk of the Colorado Supreme Court by letter that Home Light "was, effective November 1, 1986, merged into Public Service Company of Colorado" and that "Public Service has . . . succeeded to Home Light and Power as the party in interest in this proceeding."

Since this proceeding draws into question the constitutionality of statutes of the State of Colorado and neither the State of Colorado nor any agent, officer or employee of this State is a party (unless the State is a party by virtue of the fact that Greeley, a home rule city of the State of Colorado, is the Plaintiff in this action), it is noted that 28 U.S.C. § 2403(b) may be applicable, and the Attorney General of the State of Colorado has been served with a copy of this Jurisdictional Statement.

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OPINIONS BELOW

The Opinion of the Colorado Supreme Court, dated September 8, 1987, is reported at 744 P.2d 739 (Colo. 1987), and is reprinted as Appendix A. The Findings of Fact, Conclusions of Law and Judgment of the District Court in and for the County of Weld and State of Colorado, dated July 18, 1985, as amended on August 2, 1985, were not published[1], but are reprinted as Appendix B.

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[1] Greeley and Home Light filed their appeal from the District Court's judgment directly in the Colorado Supreme Court pursuant to § 13-4-102(1)(b), C.R.S., and therefore there is no Colorado Court of Appeals decision in this case.

JURISDICTION

Greeley and Home Light sought declaratory and injunctive relief prohibiting Poudre from providing, in areas annexed to Greeley, the electrical service it was authorized to provide by a Certificate of Public Convenience and Necessity issued to Poudre by the Colorado Public Utilities Commission (the "PUC"), on the basis that Greeley Ordinance No. 26, 1982 (A105)[2] prohibited the maintenance and installation of Poudre's electrical facilities within the Greeley city limits unless Poudre had a franchise from Greeley (Vol. 1, p. 2; Vol. 1, p. 299).[3]

Five weeks before the commencement of the trial, the City was permitted to amend its Complaint to limit the requested relief to "ordering Poudre Valley Rural Electric Association, Inc., to install no new facilities on rights-of-way controlled by the City of Greeley after the date of this Court's Order and Declaration" and granting declaratory relief to the same effect (Vol. 2, p. 679).

Poudre, in its Answers to the Complaints in this action, raised defenses which called into question the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter on the

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[2] Citations to the separately paginated appendices to this Jurisdictional Statement are in the form "A ____." Because the appended items are voluminous, the appendices are separately presented as permitted by Supreme Court Rule 15.1.

[3] Record references are to the volume and page number of the record before the Colorado Supreme Court, *e.g.*, Vol.__, p.__. Pursuant to Supreme Court Rule 13.1, the record has not been certified at this time because Poudre believes that the factual matters set forth herein are undisputed, and therefore does not believe that the record is "essential to a proper understanding of the case by this Court."

grounds that they were repugnant to the Constitution and laws of the United States. (A56-58 contains the record references showing that Poudre raised these issues below. The Statement of the Case at page 12 of this Jurisdictional Statement contains additional record references to the stages in the proceedings below at which the questions sought to be reviewed were raised.)

The September 8, 1987 *en banc* Opinion of the Colorado Supreme Court (A1) (sometimes referred to herein as the "September 8, 1987 Poudre Opinion") reversed the District Court's judgment that Poudre did not need a franchise from Greeley because it had a franchise from the State of Colorado and held (a) that "REA [Poudre] must obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City [of Greeley]" (A3), and (b) that the District Court "erred in denying the declaratory and injunctive relief requested in the City's amended complaint." (A18).

On September 22, 1987, Poudre timely[4] filed its Petition for Rehearing with the Colorado Supreme Court.

In Poudre's Brief on Appeal to the Colorado Supreme Court[5] and in its Petition for Rehearing (A48; A49), Poudre

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[4] Rule 40(a) of the Colorado Rules of Appellate Procedure permitted the filing of a Petition for Rehearing within fourteen days of the September 8, 1987 Opinion.

[5] "[B]ecause of its ruling in Poudre Valley's favor, the District Court did not rule on any of the other issues raised by Poudre Valley as defenses other than the conspiracy defense. Accordingly, if the Court should agree with Appellants, Poudre Valley respectfully submits it would not be appropriate to enter the declaratory relief requested by the Appellants because of the need for judicial attention to the issues . . . which have not yet been resolved by the

pointed out the need for at least remand to the District Court for an adjudication of unresolved defenses, including defenses raising Federal Constitutional issues.

Because of the District Court's ruling, Poudre's defenses listed at A56-58, including those raising matters of Federal Constitutional law, were not reached by the District Court under the well-settled principle "that a court will not rule on a constitutional question that is not essential to disposition of the case before it." *Mountain's Shadow Inn, Inc. v. Colorado Dept. of Labor*, 672 P.2d 522, 525 (Colo. 1983).

In its Petition for Rehearing Poudre also pointed out to the Colorado Supreme Court that resolving these defenses against Poudre would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution (A51; ¶12 at A58).

On October 5, 1987, the Colorado Supreme Court, *en banc*, denied Poudre's Petition for Rehearing (A43), making final its September 8, 1987 judgment.

By virtue of its September 8, 1987 Opinion and the denial of Poudre's Petition for Rehearing, the Colorado Supreme Court, the highest court of the State of Colorado in which a decision could be had, has conclusively upheld the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter (notwithstanding Poudre's Federal Constitutional defenses), as well as its own action which, in effect, resolved Poudre's defenses against Poudre without due process of law. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61,

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District Court." Pages 29-30 of Poudre's April 16, 1986 Brief on Appeal before the Colorado Supreme Court.

The District Court reached the conspiracy defense because the conspiracy contentions were also the subject of Poudre's counterclaim against Home Light.

63, 73 L.Ed. 184, 187 (1928) ("[I]t is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.") and *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 93 S.Ct. 1038, 1943 n.3, 35 L.Ed.2d 297, 305 n.3 (1973) ("On the record in this case, despite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us.").

Poudre's timely[6] Notice of Appeal was filed on December 30, 1987 in the Colorado Supreme Court (A45). Because the record has been returned to the District Court, a copy of the Notice of Appeal was also filed with the District Court, in accordance with Supreme Court Rule 10.3, on December 30, 1987.

It is well settled that municipal ordinances and city charter provisions are "statutes" as that term is used in 28 U.S.C. § 1257(2). *See King Mfg. Co. v. Augusta*, 277 U.S. 100, 103-05, 48 S.Ct. 489, 490-91, 72 L.Ed. 801, 805-06 (1928). This Court therefore has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

While the issue raised by the Colorado Supreme Court's ruling against Poudre on its defenses without due process of law may properly be raised only by a petition for a writ of certiorari, if it were the only issue as to which Poudre sought review (see 28 U.S.C. § 1257(3)), it can be joined with issues that are appealable under 28 U.S.C. § 1257(2), and therefore is properly before this Court by virtue of the timely filing of

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[6] *See* 28 U.S.C. § 2101(c) and Supreme Court Rule 11.3 which permit the filing of the Notice of Appeal within 90 days of the Colorado Supreme Court's October 5, 1987 Order Denying the Petitions for Rehearing.

Poudre's Notice of Appeal and Jurisdictional Statement. *Flournoy v. Wiener*, 321 U.S. 253, 263, 64 S.Ct. 548, 553, 88 L.Ed. 708, 715 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547, 42 S.Ct. 516, 523, 66 L.Ed. 1044, 1055 (1922).

Moreover, to the extent this Jurisdictional Statement is treated as a petition for a writ of certiorari, in whole or in part, either pursuant to the foregoing authorities or pursuant to 28 U.S.C. § 2103, it is timely. *See 28 U.S.C. § 2101(c)* and Supreme Court Rule 20.4.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Article I, Section 10 of the United States Constitution provides in relevant part that:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Article VI, Clause 2 of the United States Constitution provides in relevant part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fifth Amendment to the United States Constitution provides in relevant part that:

> [N]or shall private property be taken for public use, without just compensation.[7]

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

Colorado Appellate Rule 40(a) is reprinted as Appendix N.

Title 7, Sections 901 and 907 of the United States Code are reprinted as Appendix O.

Title 28, Section 1257 of the United States Code is reprinted as Appendix P.

Title 28, Section 2101 of the United States Code is reprinted as Appendix Q.

Title 28, Section 2103 of the United States Code is reprinted as Appendix R.

Title 28, Section 2403(b) of the United States Code is reprinted as Appendix S.

Rule 201 of the Colorado Rules of Evidence is reprinted as Appendix T.

Section 2-5-113 of the Colorado Revised Statutes is reprinted as Appendix U.

Section 31-2-217 of the Colorado Revised Statutes is reprinted as Appendix V.

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[7] This restriction is applied to the States through the Fourteenth Amendment. *See Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

Section 38-5-101 and Section 38-5-108 of the Colorado Revised Statutes are reprinted as Appendix W.

Section 40-5-101, Section 40-5-102 and Section 40-5-103 of the Colorado Revised Statutes are reprinted as Appendix X.

Section 40-6-115 of the Colorado Revised Statutes is reprinted as Appendix Y.

Greeley Ordinance No. 26, 1982 is reprinted as Appendix BB.

Article XVIII of the City of Greeley Charter is reprinted as Appendix DD.

The relevant parts of Article XX, Section 4 and Section 6 of the Colorado Constitution are reprinted as Appendix EE.

Article XXV of the Colorado Constitution is reprinted as Appendix FF.

STATEMENT OF THE CASE

At issue in this case is the authority of a State to ignore controlling decisions of this Court which not only prohibit Greeley from enacting Ordinance No. 26, 1982, but which also give Poudre a right to its "day in court" with respect to its unresolved defenses, including defenses raising Federal Constitutional issues (A56-58).

At all times relevant hereto Home Light and Poudre were electric utilities providing electric service in Colorado pursuant to Certificates of Public Convenience and Necessity issued by the PUC and the franchise granted by § 38-5-101, C.R.S. ("§ 38-5-101").

In 1970, to resolve longstanding disputes as to which entity could serve in parts of Weld County, Colorado, Home Light and Poudre entered into an agreement defining the bounda-

ries of the territory which each would be certificated to serve on an exclusive basis. The PUC approved this agreement and made it the order of the PUC in Decision No. 74654 dated April 3, 1970 (Exhibit 1).[8] Pursuant to this agreement and the PUC order approving the agreement, territory to the southwest of the 1970 city limits of Greeley was certificated to Poudre (Exhibits 1 and 11). At the time of the grant of territory to Poudre by the PUC and at the time of Poudre's acceptance of the offer in § 38-5-101 (by constructing facilities on the highways of the State of Colorado), no part of Poudre's territory was within the City of Greeley.

This case arises out of Greeley's 1981 ordinances (Exhibits Q, S, U and W), annexing a portion of Poudre's certificated territory. As the District Court noted in making its oral rulings:

> [T]he town is coming to the utility. The utility was there first, and the town is coming there.

Vol. 10, p. 161, lines 7 through 10.

Poudre prepared to serve the area southwest of Greeley because it was in its certificated territory and it had the duty to be ready to serve the needs of any population growth in that territory. At the time of the annexation, Poudre had expended $196,000 to prepare to serve the area, which included the territory actually annexed as well as other territory further southwest of Greeley contemplated for annexation (Vol. 9, p. 23, line 19 through p. 24, line 15). In addition, the aggregate of Poudre installations within the territory that Greeley's development plan had targeted for

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[8] All references to Exhibits herein are to Trial Exhibits. All Trial Exhibits were admitted by stipulation (Vol. 5, p. 47, lines 15-22).

annexation had a replacement cost, at the time of the initial annexation in 1981, of $1.3 million (Vol. 8, p. 147, lines 6-24).

In July of 1981, Home Light filed Application No. 34,000 (A29, Exhibit 4) with the PUC seeking to have Poudre expelled from serving the portion of its certificated territory recently annexed to Greeley on the basis of Home Light's franchise agreement with Greeley.

The PUC rejected Home Light's request to serve the area in question in its March 30, 1982 decision (A34), holding that to take this territory from Poudre and give it to Home Light would take Poudre's property without due process of law since Poudre was ready, willing and able to serve the area (A37). The PUC also determined that Home Light voluntarily surrendered its right to serve the area in question by virtue of its agreement with Poudre and was bound by its 1970 Agreement that Poudre would serve this territory on an exclusive basis (A38).

Home Light did not seek judicial review of the PUC Order in Application No. 34,000 and that decision is therefore binding on Home Light. *See* § 40-6-115, C.R.S. (A98).

On May 18, 1982, six weeks after the decision of the PUC in Application No. 34,000, Greeley adopted Ordinance No. 26, 1982, prohibiting electric utilities from maintaining or installing electrical transmission equipment on any street, alley, sidewalk or other public place without a franchise from the City (A105). Ordinance No. 26, 1982 provided that it was effective five (5) days after its final publication, or on May 26, 1982 (A108 and A110-11).

Over Poudre's objection, at an election held on July 13, 1982, in which Poudre did not participate[9], Greeley submitted to its "qualified electors" a proposed franchise purporting to give Poudre the right to operate throughout Greeley, even though Poudre sought to serve only in its certificated territory which was a small portion of the City involving only five services[10] (Vol. 6, p. 130, line 11 through p. 131, line 14; Exhibits 63 and 65).

Following an extensive campaign by Home Light, based in part on Home Light's suggestion that the question was whether Home Light or Poudre would serve the entire City of Greeley (*see* Exhibits 68 to 75), the proposal to grant Poudre a city franchise for the entire City was defeated by a vote of 1,050 to 419 (*see* Exhibit Y).

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[9] The last sentence of note 5 of the September 8, 1987 Poudre Opinion (A19) correctly stated that "REA objected to and declined to participate in the special franchise election." The September 8, 1987 Poudre Opinion also incorrectly stated that "REA sought consent from the qualified electorate and its request was overwhelmingly rejected in the franchise election." (A16). Not only did Poudre not seek an election, but Greeley, contrary to its Ordinance No. 26, 1982 (A105), conducted the election without Poudre's request or tender of the election cost deposit required by Section 18-3 of Greeley's Charter (A114). The first "whereas" clause of Ordinance No. 26, 1982 states that "Article XVIII of the Charter of the City of Greeley establishes a procedure for granting franchises . . . ." *(see* A105)

[10] Even though the 1981 annexations involved only five services, the evidence projected 20,148 residential units and total net revenues of $15,884,408 through the year 2010 in the portion of Poudre's territory targeted to be annexed to Greeley (Vol. 9, p. 25, line 17 through p. 33, line 14). *See also* Exhibit 68 and the testimony of Home Light's President Mr. Geile commencing at Vol. 8, p. 84.

On September 24, 1982, two months after the July 13, 1982 election, Greeley served its Complaint[11] seeking declaratory and injunctive relief prohibiting Poudre from providing electrical service in areas annexed to Greeley, on the basis that Greeley Ordinance No. 26, 1982 prohibited the maintenance and installation of Poudre's electrical facilities in Greeley without Poudre's obtaining a franchise from Greeley.

Home Light was permitted to intervene as a plaintiff in June of 1983.

The City's Amended Complaint focused on Poudre's activities subsequent to May 18, 1982, the date of adoption of Ordinance No. 26, 1982, and sought a permanent injunction "ordering Poudre . . . to install no new facilities in rights-of-ways controlled by the City of Greeley after the date of this Court's Order and Declaration." (Vol. 2, p. 679):

> 25. That Ordinance No. 26, 1982, of the City of Greeley, Colorado, passed on May 18, 1982, prohibits the installation or maintenance of any wires, cables, or equipment on, under, or above any street, alley, sidewalk, or public place in the City of Greeley without obtaining a franchise pursuant to Article XVIII of the Greeley City Charter.

Vol. 2, p. 681 (emphasis added).

Poudre, in its Answers to the Complaints, raised defenses which called into question the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter on the grounds that they were repugnant to the Constitution and laws of the

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[11] Greeley did not exercise the option to purchase Poudre's facilities which Ordinance No. 26, 1982 purported to give Greeley (Vol. 3, p. 856).

United States. (*See* Unresolved defenses quoted with Record References at A56-58.)

Poudre raised each of these defenses again in its Trial Data Certificate, (Vol. 2, pp. 442-54), filed pursuant to Section 1-18 of Colo.R.Civ.P. 121, and Greeley acknowledged in its Trial Data Certificate that Poudre had raised these defenses (Vol. 2, pp. 654-55). These defenses were then incorporated by reference into the Pretrial Order (Vol. 3, p. 856).

Both Poudre and Greeley filed motions for summary judgment based on the question of whether Greeley had the power under Colorado law to require Poudre to obtain a city franchise. In its Brief opposing Poudre's Motion and in support of its Motion, Greeley conceded that it was not entitled to the relief requested until the District Court had considered all of Poudre's defenses (Vol. 3, pp. 722-23).

At the beginning of the trial, the District Court explained the issue of fact which it believed needed to be resolved:

> It seems to me that the key case in the matter was this Englewood case, and I concur with the defendant that I'm not free, as certain counsel have suggested, to just rule that the Supreme Court went off the deep end on that one, and ignore it.
>
> • • •
>
> In any event, it appears to me that the only conclusion that you can come to on that is that there are issues of fact concerning the nature of the activity that have to be determined. Since that seems to be crucial, it appeared to me I couldn't grant any summary judgment on either side . . . .

Vol. 5, p. 2, line 14 through p. 4, line 3.

Commencing on May 22, 1984, a six-day trial was conducted to the Court, in which Poudre presented extensive evidence on its territory, history of service, and service plan, as well as its cost to be ready to serve, and the presence of its facilities and lines both within Greeley and the Greeley target annexation area.

After hearing the evidence, the District Court concluded that Poudre had a franchise from the State pursuant to § 38-5-101, and that Greeley therefore lacked power to require Poudre to obtain a city franchise. As discussed, *supra*, the District Court based its decision on *City of Englewood v. Mountain States Telephone & Telegraph Co.*, 163 Colo. 400, 431 P.2d 40 (1967).

The September 8, 1987 *en banc* Opinion of the Colorado Supreme Court (A3) reversed the judgment of the District Court that Poudre did not need a franchise from Greeley because it had a franchise from the State of Colorado and held (a) that "REA [Poudre] must obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City [of Greeley]" (A3), and (b) that the District Court "erred in denying the declaratory and injunctive relief requested in the City's amended complaint." (A18).

As stated *supra*[12] in the Jurisdiction Portion of this Jurisdictional Statement, Poudre pointed out to the Colorado Supreme Court the need for remand to the District Court to resolve unresolved defenses, including defenses raising Federal Constitutional issues.

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[12] *See* Note 5, *supra*.

Greeley did not argue that these issues had not been raised below, but rather made the conclusory and unsupported statement that "the record before this Court is wholly inadequate to support the burden Poudre Valley carries on those defenses. A return to the trial court for such a ruling would be futile. This Court should grant the complete relief requested by the City of Greeley." (*See* Greeley's Reply Brief before the Colorado Supreme Court at page 12, as to which Poudre had no right of reply.)

As discussed *infra*, Greeley's representation to the Colorado Supreme Court quoted above is not accurate. Not only was there substantial evidence to support Poudre's defenses, but that evidence was undisputed.

Poudre's Petition for Rehearing and the ruling on that petition are discussed, *supra*, in the Jurisdiction Section of this Jurisdictional Statement.

During the pendency of this Appeal, Poudre continues to provide electrical service in that portion of Greeley certificated to it by the PUC under an "Agreement for Provision of Utility Service" dated July 19, 1983 (A76) pursuant to which Ordinance No. 26, 1982 will not be enforced as to Poudre "during the course of" this litigation and Poudre "shall continue" to serve and extend service within the City of Greeley "until final judgment and exhaustion of appeals." The Agreement by its terms is not a "waiver of any claim or defense of either Poudre Valley or the City of Greeley" in this litigation (A77).

THE QUESTIONS ARE SUBSTANTIAL[13]

Poudre respectfully submits that the Judgment of the Colorado Supreme Court warrants plenary review. As shown below, the Colorado Supreme Court not only ignored controlling decisions of this Court protecting Poudre's right as a matter of federal due process to its "day in court" on its defenses, but also, in effect, ruled against Poudre on these defenses, notwithstanding controlling decisions of this Court which required a ruling in Poudre's favor.

A. THE COLORADO SUPREME COURT'S JUDGMENT DEPRIVED POUDRE OF ITS DUE PROCESS RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO AN ADJUDICATION BY THE DISTRICT COURT OF THE DEFENSES (INCLUDING FEDERAL CONSTITUTIONAL ISSUES) IT HAD RAISED TO THE COMPLAINTS IN THIS ACTION.

The effect of the September 8, 1987 Poudre Opinion requiring Poudre to "obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City [of Greeley]," and the October 5, 1987 Order denying Poudre's Petition for Rehearing, was to rule against Poudre on the defenses discussed below, as well as the other defenses reprinted at A56-58, even though these defenses were not before the Colorado Su-

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[13] Also included in this Section are Poudre's arguments, in accordance with Supreme Court Rule 21, in support of its contention that a writ of certiorari should be granted with respect to the issue raised by the Colorado Supreme Court's ruling against Poudre on its defenses without due process of law. *See* authority cited in "Jurisdiction" section of this Jurisdictional Statement for joining this issue with those issues raised in Poudre's Appeal.

preme Court because the District Court had no need to and therefore did not decide them.

Poudre is entitled, as a matter of due process, to an adjudication by the District Court of these defenses. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102, 77 L.Ed. 231, 239 (1932) ("Due process requires that there be an opportunity to present every available defense . . . .") and *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102, 1106-07 (1932) ("[T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked.").

In *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917), this Court recognized that it is a denial of due process not to permit a party to present evidence in support of his case after reversal by a state supreme court of a judgment in his favor. *See also Winbourne v. Eastern Air Lines*, 632 F.2d 219 (2d Cir. 1980) (District Court's grant of summary judgment, without reaching issues of fact raised by defendants' affirmative defenses, was denial of due process); *Thompson v. Madison County Board of Education*, 476 F.2d 676, 678 (5th Cir. 1973) (Due process requires opportunity to "present evidence and argument on the contested facts and legal issues framed by the answer to the complaint.").

The Colorado Supreme Court's Judgment has denied Poudre its "day in court" on these fundamental issues and Poudre respectfully submits that this case should be remanded to the District Court in and for the County of Weld for an adjudication of these issues.

B. GREELEY ORDINANCE NO. 26, 1982 AND ARTICLE XVIII OF THE GREELEY CHARTER VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, BECAUSE THEY STAND AS OBSTACLES TO THE ACCOMPLISHMENT OF THE PURPOSE OF THE RURAL ELECTRIFICATION ACT.

Under the Supremacy Clause, U.S. Const., Article VI, Cl. 2[14], the enforcement of a state law is preempted by federal law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 1310, 51 L.Ed.2d 604, 614 (1977).

It is undisputed that all of Poudre's assets, including those in areas annexed by Greeley, have been mortgaged[15] to the Rural Electrification Administration (the "REA"), an agency of the United States Department of Agriculture, as security for loans made pursuant to the Rural Electrification Act, 7 U.S.C. § 901 *et seq.*

In connection with its conclusion that Poudre's activities were a matter of statewide and national concern (and not local concern), the District Court found that granting the relief requested by Greeley "would prevent adequate service to rural territory in the vicinity of expanding cities" (emphasis added), but did not reach the Supremacy Clause defense as a matter of law:

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[14] Poudre raised the defense that granting the relief requested by Greeley would violate the Supremacy Clause of the United States Constitution in its Answers and in its Petition for Rehearing. (¶ 11 at A58; A50-51).

[15] *See* Exhibit 88 and the testimony of Poudre's General Manager, Ronald J. Carey, at Vol. 8, p. 113, line 18 through p. 114, line 17.

> 35. To allow the expulsion of a [SIC] electric utility from portions of its certificated territory by virtue of annexation of that territory by a municipality which franchises another utility would create serious problems. It would handicap the certificated electric utility in providing suitable service to its territory because long term planning would be difficult or impossible. Large scale investment in plant and equipment could not be jusitified [SIC] if the utility were subject to expulsion at the whim of adjoining cities. These and other similar considerations would prevent adequate service to rural territory in the vicinity of expanding cities.

¶ 35 at Vol. 3 at p. 1029 (emphasis added); A26.

The validity of this finding was not challenged on appeal by Greeley or Home Light.

Thus, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter violate the Supremacy Clause of the United States Constitution because they stand as obstacles to the accomplishment of the objectives of the Rural Electrification Act. *See Public Util. Dist. No. 1 of Pend Oreille Co. v. United States*, 417 F.2d 200, 201 (9th Cir. 1969) (Condemnation of an REA-financed utility violated the Supremacy Clause because "if, as a result of the condemnation, the loans to Inland were paid in full, but the remaining portions of the system could not continue to operate with decent service and at decent rates, the Government would have been paid but the purpose of the Rural Electrification Act [of providing low cost energy to rural areas] would have been frustrated."). *See also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389, 103 S.Ct. 1905, 1915, 76 L.Ed.2d 1, 13 (1983) ("[A] particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be

implicitly pre-empted by the Rural Electrification Act," citing *Jones v. Rath Packing Co., supra).*

C. GREELEY'S 1981 ANNEXATION ORDINANCES, GREELEY ORDINANCE NO. 26, 1982 AND ARTICLE XVIII OF THE GREELEY CHARTER IMPAIR (A) POUDRE'S CONTRACT WITH THE STATE OF COLORADO AND (B) POUDRE'S CONTRACT WITH HOME LIGHT, IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

This Court has recently noted that the Contract Clause[16] "is not a dead letter," *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727, 734 (1978), and that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relations between private parties." 438 U.S. at 244 n.15, 98 S.Ct. at 2722 n.15, 57 L.Ed.2d at 736 n.15.

"When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court." *Irving Trust Co. v. Day,* 314 U.S. 556, 561, 62 S.Ct. 398, 401, 86 L.Ed. 452, 457 (1941).

This Court's opinion in *Irving Trust, supra,* makes it clear that the Colorado Supreme Court's rulings on matters of

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[16] Poudre raised the Impairment of Contract defense in its Answers and in its Petition for Rehearing (¶¶ 5 and 6 at A57 and A50).

Colorado State law must yield to the provisions of the Federal Constitution, including the Contract Clause.

In *Russell v. Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912 (1914), this Court held that a contract was created between the state and the utility when the utility accepted the offer by the state contained in a constitutional provision similar to § 38-5-101, by constructing facilities to prepare to serve a geographic area:

> [T]he provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court.

233 U.S. at 204, 34 S.Ct. at 520, 58 L.Ed. at 921.

Russell v. Sebastian also held that the contract between the utility and the state created by the utility's installing lines and preparing to serve a geographic area, permitted the utility not only to continue to maintain its existing facilities, but to expand them:

> [W]e find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service . . . . In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city.

233 U.S. at 208, 34 S.Ct. at 521, 58 L.Ed. at 923 (citations omitted) (emphasis added).

Russell v. Sebastian reversed the California Supreme Court's refusal to grant a writ of habeas corpus to a person arrested on the charge of excavating in a city street in violation of a municipal ordinance, and recognized, not only that it was not bound by the California Court's determination that the utility had no vested rights which permitted it to expand its facilities without a city franchise, but that the issue of what rights had been acquired prior to the allegedly impairing legislation was a "question which, in view of the appeal to the clause of the Federal Constitution prohibiting state legislation impairing the obligation of contracts, it is the duty of this court to determine for itself." 233 U.S. at 202, 34 S.Ct. at 519, 58 L.Ed. at 920.

In rejecting the California Supreme Court's construction of its constitutional provision that the contract between the state and the city did not entitle the utility to extend its facilities, this Court held in *Russell v. Sebastian* that the only possible construction was that the contract between the state and the utility permitted the utility to expand its facilities:

> This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the state's offer was the obligation to provide facilities that were reasonably adequate . . . . But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.

233 U.S. at 208-09, 34 S.Ct. at 521-22, 58 L.Ed. at 923 (citations omitted) (emphasis added).

See also Detroit United Railway v. Michigan, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268 (1916) (Township and village

franchises were subsisting and valid contracts which could not be impaired by the subsequent act of the Michigan legislature extending a city's limits.); *Traverse City v. Consumers Power Co.*, 340 Mich. 85, 64 N.W.2d 894 (1954) (reversing, based on *Russell v. Sebastian*, a lower court judgment which precluded Consumers Power from extending its lines within a city without a city franchise covering the expansion area); *City of Beverly Hills v. City of Los Angeles*, 175 Cal. 311, 165 P. 924 (1917) (affirming, based on *Russell v. Sebastian*, a lower court judgment that the City of Beverly Hills lacked authority to require the City of Los Angeles to obtain a city franchise where it had a state franchise granted by the County of Los Angeles prior to the incorporation of the City of Beverly Hills.).

If the District Court had reached the Impairment Defense, the evidence was uncontroverted that long before Greeley commenced annexing Poudre's territory in 1981, and long before Greeley Ordinance No. 26, 1982 became effective on May 26, 1982, Poudre had constructed 2,400 miles of lines, including lines running through Greeley.[17] Construction of Poudre's system in Weld County from 1940 through 1981 began pursuant to a 1940 permit from Weld County (*see* A101 and Exhibits 103, 125 and 126), 18 years before Greeley acquired the powers of a home rule city in July of 1958[18], 41

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[17] *See, e.g.*, Vol. 6, p. 156, lines 10-12 and lines 18-25; Vol. 8, p. 112, line 23 through p. 113, line 5; Vol. 8, p. 147, line 6 through p. 151, line 9; Vol. 10, p. 38, line 6 through p. 41, line 14.

[18] Under Article XX, Section 6 of the Colorado Constitution, Greeley acquired the powers of a home rule city when it filed its home charter with the Colorado Secretary of State in July of 1958 (A120 and A113).

However, § 31-2-217, C.R.S., reprinted at A92, provides that the adoption of a home rule charter cannot affect vested rights.

years before Greeley adopted its 1981 Annexation Ordinances (Exhibits Q, S, U and W), and 42 years before Greeley enacted franchise Ordinance No. 26, 1982 (A105).

Applying these undisputed facts to the applicable Colorado law, it is clear that Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter impaired Poudre's contracts.

In *City of Englewood*, the City sought, among other things, a declaratory judgment that Mountain States Telephone had no right to occupy or use the City's streets for its poles, lines and wires without obtaining a city franchise. The dispute arose because on expiration of a twenty-year franchise by the City, Mountain States Telephone declined to seek a new franchise. Mountain States Telephone contended it had a right to continue to occupy the City's public streets and alleys without a new city franchise by virtue of § 50-5-1, C.R.S. 1963, now § 38-5-101. (Sections 38-5-101 and 38-5-108, reprinted at A93, are in all material respects identical to Sections 2451 and 2458 of Chapter 45 of the 1908 Colorado Revised Statutes and were first passed by the Colorado Legislature in 1907.)

In *City of Englewood*, the Colorado Supreme Court held that Mountain States Telephone had a franchise from the State by virtue of § 50-5-1 [now § 38-5-101, reprinted as Appendix W at A93] and that the provisions of Article XX of the Colorado Constitution (which granted power to home rule cities) had no application because its language only applied in cases where the individual or corporation did not have a franchise from the State.

> Here defendant has a franchise from the state by virtue of C.R.S. 1963, 50-5-1 [now § 38-5-101]. Such a holding, as in *McPhee*, does no violence to the constitutional provisions permitting home rule cities to grant

> franchises, for those provisions are applicable to situations such as were presented in *Baker, supra*, where the individual or corporation does not have some type of a state franchise. Thus Article XX has no application here.

163 Colo. at 406-7, 431 P.2d at 43 (emphasis added).

In *City of Englewood*, the Colorado Supreme Court also held that the franchise from the State granted by § 50-5-1 [now § 38-5-101] permitted Mountain States "not only to maintain its facilities in plaintiff's public ways, but also . . . to construct and operate additional ones therein without obtaining a city franchise."

163 Colo. at 405, 431 P.2d at 42 (emphasis added).

City of Englewood also held that, where the entity seeking permission has a franchise from the State, the home rule city expresses its consent under § 50-5-8 [now § 38-5-108] through its reasonable exercise of its police power:

> We point out that C.R.S. 1963, 50-5-8 [now § 38-5-108] is perfectly consistent with defendant's position that the city may require, under its police power, reasonable acts on the part of anyone using its streets. For example, it can require the securing of a permit or license, with attending fee requirements, prior to the erection of a new pole in a certain place or the extension of a wire along a particular street or the reasonable regulation of objects which may be placed in its streets and alleys.

163 Colo. at 407, 431 P.2d at 43-44 (emphasis added).[19]

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[19] The City's Complaints in this action (like the amended complaint in the *City of Englewood* case) did not allege that Poudre is unwilling to obtain whatever permits are required by the City or to pay the charges or assessments the City might impose. That is because Poudre's willingness to do so is undisputed. *See, e.g.*,

In *City of Englewood*, the Colorado Supreme Court held that in enacting § 50-5-1, C.R.S. 1963 [now § 38-5-101], the Colorado Legislature acted "well within the boundaries of Article XXV"[20] of the Colorado Constitution and that the term "public highways" as used in § 50-5-1 [now § 38-5-101] was not limited to those highways located outside the boundaries of home rule cities but included the streets within such cities as well. 163 Colo. at 405, 431 P.2d at 42.

Thus, under the Colorado Supreme Court's decision in *City of Englewood*, Poudre did not need to obtain a franchise from Greeley because it "has a franchise from the state by virtue of C.R.S. 1963, § 50-5-1" [now § 38-5-101] and the City is "powerless to require a further franchise." 163 Colo. at 406, 431 P.2d at 43.

Exhibit 57 and the District Court's Finding No. 15 (paragraph 15 at page 2 of the District Court's Findings of Fact, Conclusions of Law and Judgment A23, Vol. 3 at p. 1027).

Moreover, because the issue was not in the case, the District Court did not reach the issue of Greeley's consent pursuant to its exercise of the police powers (paragraph 6 at page 5 of the District Court's Findings of Fact, Conclusions of Law and Judgment, A27, Vol. 3 at p. 1030).

[20] In *Denver v. Public Utilities Commission*, 181 Colo. 38, 43-44, 507 P.2d 871, 873 (1973), the Colorado Supreme Court held that Article XXV (which was added to the State Constitution in 1954) took away from cities the power to regulate privately owned public utilities within home rule cities:

[T]he purpose of the change [the addition of Article XXV of the Colorado Constitution] was to grant to the General Assembly the authority to regulate privately owned public utilities *within* home rule cities. Without the grant of such power the regulation of service among the inhabitants of the city was a local matter, and the laws of the state in conflict with ordinances and charter provisions enacted pursuant to Article XX had no force and effect within the municipality. (Emphasis added and in the original.)

In support of its argument that Poudre could be precluded from expanding its facilities, Greeley[21] urged that *City of Englewood, supra,* was not properly decided (see e.g., page 10, n.2 of Greeley's Reply Brief before the Colorado Supreme Court) and conceded "that the Court in *Englewood* construed the foregoing statutory provisions [§§ 38-5-101 and 108] as a grant of a franchise from the State . . . ." Page 19 of Greeley's Opening Brief before the Colorado Supreme Court.

It is therefore clear that the City of Greeley, the Colorado Municipal League, Poudre, the District Court and the Colorado Supreme Court in the *City of Englewood* case all understood that § 38-5-101 granted Poudre a State franchise, subject only to the reasonable exercise of the police power under § 38-5-108.

Moreover, subsequent to the Colorado Supreme Court's decision in *City of Englewood*, § 50-5-1 and 50-5-8 (which were the citations to the 1963 Colorado Revised Statutes) were reenacted in the 1973 Colorado Revised Statutes as § 38-5-101 and § 38-5-108 (*see* § 2-5-113, C.R.S.). Accordingly, under Colorado law the Colorado Legislature has approved the judicial construction of § 38-5-101 and 108 contained in *City of Englewood*. *See Moorehead v. John Deere Inc. Equipment Co.*, 194 Colo. 398, 401, 572 P.2d 1207, 1209 (Colo. 1978) ("Where statutes are reenacted, the judicial construction placed upon them is deemed to have been approved by the General Assembly, with the understanding that the former construction will be adhered to.").

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[21] The Colorado Municipal League also conceded that for Greeley to prevail, *City of Englewood* had to be reversed. *See* page 30 of its Opening Brief before the Colorado Supreme Court and page 3 of its Reply Brief before the Colorado Supreme Court.

The September 8, 1987 Poudre Opinion states that it distinguishes this case from *City of Englewood* on the basis that the telephone company once had a city franchise, even though it was refusing to renew it after its expiration. The *City of Englewood* decision cannot be distinguished on that basis because the reason in *City of Englewood* for permitting the telephone company not only to maintain but to expand its existing facilities was § 38-5-101 and not (as stated in the September 8, 1987 Poudre Opinion, at A15-16, that the telephone company once had a franchise from the City which had expired at the time of the *City of Englewood* case. *City of Englewood* held that the telephone company,

> regardless of the validity of its original city franchise (a point we need not decide), acquired what in law is a valid state franchise or right by virtue of C.R.S. 1963, 50-5-1 and 8. [Now § 38-5-101 and § 38-5-108]. This permitted it not only to maintain its facilities in plaintiff's public ways, but also the right to construct and operate additional ones therein without obtaining a city franchise. (Emphasis added.) 163 Colo. at 405, 431 P.2d at 42.

Under the authorities cited, *supra*, this Court has a duty to decide for itself the federal questions of whether there was a contract between Poudre and the State of Colorado and the extent of Colorado's obligation to Poudre under that contract. Deciding those issues necessarily includes an examination of the validity of the distinction made by the Colorado Supreme Court in its September 8, 1987 Poudre Opinion.

Poudre respectfully submits that, not only does Poudre have a right to expand its facilities as a matter of Federal Constitutional law under the authorities cited, *supra*, but the Colorado Supreme Court's ruling that Poudre can maintain its facilities on Greeley's streets to serve existing but not new

customers (A3; A18), does not track with the language of Ordinance No. 26, 1982 which on its face prohibits Poudre from maintaining its facilities to serve existing customers without obtaining a city franchise.

The lack of a rational basis for the distinction drawn by the Colorado Supreme Court in its September 8, 1987 Poudre Opinion is also evidenced by the Petition for Rehearing filed by the Amicus in support of Greeley's position in the Colorado Supreme Court (A59; §§ 7, 8 at A62).

Moreover, as set forth, *supra*, at pages 22 and 23, it is undisputed that Poudre, like the telephone company *in City of Englewood* had all required consents (including a permit from Weld County, A101 and Exhibit 103) before it began construction, commencing in 1940, in the geographic area which was annexed to Greeley in 1981 and is in the Greeley target annexation area.

Accordingly, under *City of Englewood*, Poudre was entitled to expand its facilities because "there is nothing in C.R.S. 1963, § 50-5-8 which requires the consent of a municipality for the maintenance or operation of telephone facilities once they have been previously, and we assume, lawfully installed." 163 Colo. at 407, 431 P.2d at 44.

Because it is undisputed that Poudre accepted the offer from the State of Colorado found in § 38-5-101 in 1940 (prior to the enactment of the 1981 Annexation Ordinances, prior to the enactment of Ordinance No. 26, 1982 and prior to Greeley's acquisition of the power of a home rule city in July of 1958), Poudre is entitled under *Russell v. Sebastian*, *supra*, to expand its facilities as a matter of Federal Constitutional law.

Accordingly, Greeley's 1981 Annexation Ordinances, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter (which were given effect by the September 8, 1987 Poudre

Opinion) impaired not only Poudre's contract with the State (created no later than 1940 when it commenced construction of its facilities on the highways of the State of Colorado), but also Poudre's 1970 contract with Home Light, defining the boundaries which each would be certificated by the PUC to serve on an exclusive basis, and which the PUC found in Application No. 34,000 was binding on Home Light and constituted a voluntary surrender of Home Light's right to serve in the area in question (A38).

D. GREELEY ORDINANCE NO. 26, 1982 AND ARTICLE XVIII OF THE GREELEY CHARTER DEPRIVE POUDRE OF THE FRANCHISE IT HAD OBTAINED FROM THE STATE OF COLORADO WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is well settled that a franchise granted by "the state in consideration of the performance of a public service . . . constitutes a property right within the protection of the Fourteenth Amendment." *Frost v. Corporation Commission*, 278 U.S. 515, 520, 49 S.Ct. 235, 237, 73 L.Ed. 483, 487 (1929). Colorado has also recognized that a utility's right to serve within its certificated area constitutes a property right which cannot be taken except by due process of law. *Western Colorado Power Co. v. Public Utilities Commission*, 163 Colo. 61, 69, 428 P.2d 922, 926-27 (1967).

Clearly, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter deprive Poudre of its franchise from the State of Colorado without due process of law, because under *Frost, supra*, Poudre is entitled to operate its business within its PUC-certificated territory including any portion of that territory within Greeley's city limits.

CONCLUSION

By refusing to permit Poudre to have its "day in court" on its defenses raising Federal Constitutional issues and by resolving these defenses against Poudre, the Colorado Supreme Court has ignored controlling decisions of this Court, depriving Poudre of its property right in its franchise from the State of Colorado without due process of law, frustrating the purposes of the Rural Electrification Act and impairing Poudre's contract with the State of Colorado and its contract with Home Light. Moreover, the refusal of the Colorado Supreme Court to permit Poudre to have its "day in court" on its defenses deprived Poudre of its due process right to an adjudication of these defenses.

For these reasons, the Court should note probable jurisdiction. Moreover, in view of the conflict of the decision below with past decisions of this Court, Poudre respectfully requests the Court to consider either summary reversal of the judgment of the Colorado Supreme Court or to order the Colorado Supreme Court to remand this case to the District Court in and for the County of Weld so that it can make findings of fact and conclusions of law with respect to Poudre's unresolved defenses (A56-58).

Respectfully submitted,

Of Counsel
RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th Street, #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, #2440
Denver, CO 80202
(303) 292-1500

December 31, 1987

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Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
a Colorado corporation,

Appellant,

v.

THE CITY OF GREELEY, COLORADO,
a municipal corporation,
and HOME LIGHT AND POWER COMPANY,
a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

APPENDICES TO JURISDICTIONAL STATEMENT

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, Suite 2440
Denver, CO 80202
(303) 292-1500

Of Counsel
RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th Street, #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

December 31, 1987

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SUPREME COURT,
STATE OF COLORADO
NO. 85SA293

September 8, 1987

THE CITY OF GREELEY, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation, *Plaintiffs-Appellants,*

v.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC. *Defendant-Appellee.*

Appeal from District Court, Weld County
Honorable Robert A. Behrman, Judge

EN BANC

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
CASE REMANDED WITH DIRECTIONS

Law Department City of Greeley
Don K. DeFord
Glenwood Springs, Colorado

Edward "Jed" M. Caswall
John P. DiFalco
Greeley, Colorado
Attorneys for Plaintiff-Appellant
The City of Greeley

Kelly, Stansfield & O'Donnell
Donald D. Cawelti
James K. Tarpey
Denver, Colorado
Attorneys for Plaintiff-Appellant
Home Light and Power Company

(Continued)

Holmes & Starr, P.C.
Kenneth L. Starr
Ann Livedalen
Denver, Colorado

Randolph W. Starr
Denver, Colorado
Attorneys for Defendant-Appellee
Poudre Valley Rural Electric Association, Inc.

John J. Conway
Denver, Colorado
Attorney for Amicus Curiae
Colorado Rural Electric Association

Gerald E. Dahl
Tami A. Tanoue
Denver, Colorado
Attorneys for Amicus Curiae
Colorado Municipal League

Gorsuch, Kirgis, Campbell, Walker and Grover
Paula M. Connelly
Joseph B. Wilson
Denver, Colorado
Attorneys for Amicus Curiae
Colorado Assoc. of Municipal Utilities

JUSTICE ERICKSON delivered the Opinion of the Court.

The City of Greeley (City) and the Home Light and Power Company (Home Light), plaintiffs below, appeal from an adverse judgment of the Weld County District Court.[1] The trial court held that provisions of the City Charter and City Code, which require public utilities to obtain a franchise to use city streets, were unenforceable against the defendant, Poudre Valley Rural Electric Association (REA). REA claimed, and the trial court held, that REA had the right to continue and expand electric service in a portion of an area annexed by the City, because the relevant annexed area previously was served by REA pursuant to a certificate of public convenience and necessity issued by the Public Utilities Commission (PUC). We conclude that REA is not required to obtain a city franchise to operate and maintain its electric distribution system within the City as it existed at the time of the annexation. REA must obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City. We affirm the district court in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

The facts are largely undisputed and are contained in the findings of the trial court. The present action is the culmination of a fifteen-year dispute between Home Light and REA over the right to provide electric service in certain areas of Weld County.

Greeley is a home rule city under Article XX, section 6 of the Colorado Constitution. Home Light is a private corporation operating as an investor-owned utility. REA is a cooperative electric association and is a public utility under section 40-1-103(2), 17 C.R.S. (1984).[2]

On June 18, 1968, Home Light obtained a twenty-five-year franchise from the City, which granted Home Light the right to provide electric service within the territorial boundaries of the City. The franchise was approved by qualified electors in accordance with Colo. Const. art. XX, §§ 4 and 6, and provides: "The Company [Home Light] shall furnish electric energy within the corporate limits of the city as such limits now exist or may during the term of this franchise be extended . . . ." The franchise was confirmed by PUC Decision No. 71606 on July 18, 1968.[3]

Before the 1968 franchise was granted, Home Light, REA, and the Public Service Company of Colorado were parties involved in litigation relating to their respective rights to serve Boulder, Weld, and Larimer Counties. The litigation culminated in *Public Utilities Commission v. Home Light and Power Co.*, 163 Colo. 72, 428 P.2d 928 (1967) (*Home Light I*). The district court in *Home Light I* reversed a PUC decision dividing the disputed service areas among the various electric companies. We affirmed the judgment of the district court in part and reversed in part. Following the decision in *Home Light I*, Home Light and REA stipulated to a division of some of the disputed services areas. The stipulation was submitted to the PUC and, in PUC Decision No. 74654 (April 3, 1970), the PUC approved the territorial division agreed to by the companies. Each utility was granted a certificate of public convenience and necessity to provide service in the area allocated by stipulation. The PUC's confirmation of the stipulation made no provision for changing the territorial allocation in the event of municipal annexation, and, when PUC Decision No. 74654 was announced, no part of the territory assigned to REA was within the corporate boundaries of the City.

In 1981, the City annexed areas to the south and west, including a parcel known as Highland Park West.[4] REA was authorized to serve a portion of Highland Park West pursuant to the 1970 stipulated territorial division approved by the PUC. At the time of trial, REA was providing service to approximately five customers in Highland Park West and its certificate of public convenience and necessity authorized REA to serve only the area within the western edge of the subdivision. The remainder of the subdivision was certificated to Home Light.

On July 15, 1981, Home Light filed Application No. 34000 with the PUC to determine whether Home Light's 1968 City franchise included the right to provide electric service in the annexed area, including that portion of Highland Park certificated to REA. A hearing was held and the hearing officer recommended that the application be dismissed. Home Light sought review by the PUC and filed exceptions to the hearing officer's recommendation. The PUC adopted the hearing officer's recommendation and concluded that REA rather than Home Light was authorized to provide service in its certificated area within the annexed territory. The PUC declared that a certificated area constitutes a valuable property right that cannot be taken except by due process of law, and that due process is satisfied only upon a showing that the certificated utility is unwilling or unable to serve its certificated area. The PUC determined that Home Light did not introduce any evidence "to establish unfitness on the part of Poudre Valley [REA] to serve the area in question," and dismissed Home Light's application. The final paragraph of the PUC decision states:

> Home Light contends . . . that it obtained a franchise from Greeley to provide utility service within the Greeley municipal boundaries. Home Light further contends

> that this right extends to future annexations of the city, and areas certificated to Poudre Valley outside of such area must give way to the franchise right. The Commission need not decide whether this abstract statement by Home Light is legally correct, [because] in any event this contention disregards the 1970 agreement between Home Light and Poudre Valley, where these parties agreed to serve certain areas on an exclusive basis. By the 1970 agreement, territory to the south and west of the 1970 city limits of Greeley, the area involved in this proceeding, was to be served by Poudre Valley on an exclusive basis. The Commission gave specific approval and effect to this agreement in Decision No. 74654, dated April 3, 1970. Accordingly, Home Light and Power voluntarily surrendered its right to serve in the area in question.

Home Light did not seek judicial review of the PUC order dismissing its application. *See* § 40-6-115, 17 C.R.S. (1984).

On May 18, 1982,[5] the City Council enacted Ordinances 26 and 27. Ordinance 26, codified as Chapter 14.40 of the City Code, required an electric utility to obtain a city franchise before operating within the city limits:

> *14.40.010 Compliance.* It is unlawful to maintain or install any wires, cables or other equipment for the transmission of electric current impulses in, on, under or over any street, alley, sidewalk or other public place in the city, or to maintain or install any pole or mast to support or hold such wires or equipment in any such place, without having fully complied with the provisions of this chapter.
>
> *14.40.020 Franchise — Required.* After the effective date of the ordinance codified in this section, no such

> wire, cable, pole or other equipment shall be installed or maintained over, on or under any such place unless, pursuant to Article XVIII of the Charter of the city, a franchise has been granted for such installation or maintenance. In order to permit the necessary time to obtain a franchise pursuant to Article XVIII of the City Charter, any facilities described in Section 14.40.010 which exist on the effective date of the ordinance codified in this section may continue to be maintained for a period of one hundred eighty days after the effective date of the ordinance codified in this section without the requirement of a franchise.

Section 18-3 of Article XVIII of the City Charter prohibited the City from granting any franchise "except upon the majority vote of the qualified electors voting thereon at a special election called for such purpose."[6] Ordinance 27 authorized an election by qualified electors to determine whether a franchise should be awarded to REA. The terms of the proposed franchise were essentially the same as those of the franchise granted to Home Light in 1968. The election was held on July 13, 1982, and the electorate rejected the proposed franchise by a vote of 1,505 to 419.

On September 22, 1982, the City commenced this action for declaratory judgment against REA in the Weld County District Court. The original complaint sought (1) a declaration that REA could not operate that portion of its electric distribution system installed within the City without obtaining a franchise, and (2) an injunction ordering REA to cease operating that system and dispose of it. Home Light was permitted to intervene, and its complaint sought (1) a declaration that Home Light was the proper utility to render electric service within the city limits, and (2) an injunction prohibiting REA from providing electric service within the

City. REA answered the City's complaint and Home Light's complaint in intervention. The City amended its complaint, limiting its prayer for injunctive relief to prohibit REA from extending its facilities without first obtaining a franchise. Home Light did not amend its complaint in intervention.

Trial was held in May 1984. The trial court found that (1) REA serves a total of 17,000 customers, six of whom were located within the City, (2) REA obtained its power through a statewide and interstate network, and (3) REA's "predominant epicenter is not limited to a local focus, and particularly is not limited to plaintiff city." The district court concluded:

> 3. Decision No. 74664 of the Colorado Public Utilities Commission dividing territory in Weld County, Colorado, between plaintiff Home Light and defendant is equivalent to a state franchise for defendant to provide electric service to the territory assigned to it.
>
> 4. Plaintiff Greeley does not have the power to require a city franchise as a condition for service by defendant in the portions of plaintiff Greeley lying within the area assigned to defendant by the Colorado Public Utilities Commission decision No. 74664.
>
> 5. Plaintiff Home Light may not provide electric service to those portions of plaintiff Greeley within the area assigned to defendant by decision No. 74664 of the Colorado Public Utilities Commission

The district court entered the following judgment:

> (A) The plaintiff City of Greeley, Colorado, has no power to require a city franchise as a condition to the continuation or expansion of the electric service provided by the defendant [REA] in any area which was awarded to that defendant by [PUC] decision No. 74664 . . . , dividing territory in Weld County, Colo-

rado, between defendant and plaintiff Home Light and Power Company and which area has been or shall hereafter be annexed to plaintiff City of Greeley. Any provisions of the charter or ordinances of the plaintiff City of Greeley requiring such a franchise are void as against defendant.

(B) Regardless of the terms of its city franchise from plaintiff City of Greeley, plaintiff Home Light and Power Company may not provide electric service to the portions of plaintiff City of Greeley lying within the area which was awarded to defendant [REA] by [PUC] decision No. 74664 . . . .

II.

The City contends that REA cannot use streets, alleys, sidewalks or other public places to expand its present facilities in the annexed area without first obtaining a city franchise in accordance with section 14.40 of the City Code and Article XVIII of the City Charter. REA maintains that the City cannot condition REA's expansion of its current facilities within the annexed area upon the acquisition of a municipal franchise because (1) REA's certificate of public convenience and necessity is a state franchise to provide service in its certificated area, and (2) the state franchise supersedes the requirement for a municipal franchise because REA's business is a matter of statewide concern. It is necessary to review the nature and the source of the rights conferred by municipal franchises and PUC certificates of public convenience and necessity to resolve the issues on appeal.

A. Municipal Franchises

We have defined a franchise as "a special right or privilege, granted by a government to an individual or corporation — such a right as does not ordinarily belong to citizens in general." *City of Englewood v. Mountain State Tel. & Tel. Co.*, 163 Colo. 400, 405, 431 P.2d 40, 43 (1967); *see also Community Tele-Communications v. Heather Corp.*, 677 P.2d 330 (Colo. 1984); *City of Englewood v. Crabtree*, 157 Colo. 593, 404 P.2d 525, *cert. dismissed*, 382 U.S. 934 (1965); *see generally* 12 E. McQuillin, *Municipal Corporations* § 34.03, at 11 (3d ed. 1986). A "grant of a right to maintain and operate public utilities within a municipality and to exact compensation for such services is a franchise." 12 E. McQuillin, *Municipal Corporations* § 34.03, at 11 (3d ed. 1986); *see also Berman v. City and County of Denver*, 120 Colo. 218, 209 P.2d 754 (1949) (authorization to operate busses and trolleys along Denver streets was a franchise); *Baker v. Denver Tramway Co.*, 72 Colo. 233, 210 P. 845 (1922) (authorization for the construction of a street railway was a franchise).

The state has the power to grant franchises because the franchise power inheres in the sovereign. Thus, a "municipal corporation in granting [a franchise] acts as the agent of the state. In this relation it represents the state's sovereign power." 12 E. McQuillin, *Municipal Corporations* § 34.03, at 11 (3d ed. 1986); *see also Sioux City St. Ry. Co. v. Sioux City*, 138 U.S. 98 (1891); *Hayes v. Michigan Cent. R.R. Co.*, 111 U.S. 228 (1884). The power of the sovereign to grant franchises is subject, of course, to constitutional limitations, "as, for example, a provision requiring the obtaining, in respect of certain franchises, of the consent of local authorities . . . ." 37 C.J.S. *Franchises* § 14, at 157 (1943).

When this case was commenced, the Colorado Constitution prohibited the grant of a franchise "relating to any

street, alley or public place" in the City and County of Denver "except upon the vote of the qualified taxpaying electors . . . ." Colo. Const. art. XX, § 4. The same prohibition was extended to all home rule municipalities by Colo. Const. art. XX, § 6. *See e.g., Community Tele-Communications v. Heather Corp.*, 677 P.2d 330 (Colo. 1984). The object of article XX, sections 4 and 6, is to give the taxpaying electors of home rule cities absolute control over the granting of franchises to use city streets, alleys and public places. *Id.* at 336; *Berman v. City and County of Denver*, 120 Colo. 218, 239, 209 P.2d 754, 760 (1949); *Ward v. Colorado E. R.R. Co.*, 22 Colo. App. 332, 135 P. 567 (1912), *aff'd*, 59 Colo. 589, 149 P. 1193 (1915). Thus, our Constitution prohibits the State from granting a franchise "relating to" the streets of home rule cities without obtaining the consent of the municipality in the form of a vote of the qualified, taxpaying electors.

B. Certificates of Public Convenience

In 1954, the Colorado Constitution was amended to include Article XXV, which provides:

> Public Utilities
>
> In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the

> State of Colorado as the General Assembly shall by law designate.
>
> Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; *provided, however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises;* and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.

(Emphasis added).

Article XXV vests the PUC with the power to regulate the "facilities and service and rates and charges therefor" of public utilities, "wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town." The authority granted is subject to two exceptions: Article XXV does not affect the power of municipalities to exercise reasonable police and licensing powers, "nor their power to grant franchises," nor does it apply to municipally owned facilities.

Article XXV grants the PUC authority to issue certificates of public convenience and necessity. *See Miller Bros. v. Public Util. Comm'n*, 185 Colo. 414, 525 P.2d 443 (1974). Generally, a certificate of public convenience and necessity creates a right to service the customers in the certificated region, unless the company is not ready, willing, and able to provide the service requested. *Rocky Mountain Natural Gas Co. v. Public Util. Comm'n*, 199 Colo. 352, 617 P.2d 1175 (1980). We have stated that the "right to give service under an existing certificate of convenience and necessity is a property right under Colorado law and may not be affected except by due

process of law." *Public Serv. Co. v. Public Util. Comm'n*, 174 Colo. 231, 234, 483 P.2d 1337, 1339 (1971) (citation omitted).

The authority of the PUC to grant certificates of public convenience and necessity is expressly limited by our constitution and statutes. *Union Rural Elec. Ass'n v. Town of Frederick*, 670 P.2d 4, 6 (Colo. 1983). Colorado Constitution article XXV, the provision which vests the PUC with its broad regulatory authority, expressly provides that it does not affect a municipality's authority to grant franchises, which is reserved to its taxpaying electorate. Colo. Const. art. XX, §§ 4, 6. The statutes delineating the power and jurisdiction of the PUC also indicate that a PUC certificate is in addition to, and not superior to, a municipal franchise. Section 40-5-101, 17 C.R.S. (1984), prohibits a public utility from constructing "a new facility, plant, or system ... without first" obtaining "from the commission a certificate that the present or future public convenience and necessity require or will require such construction." Section 40-5-102, 17 C.R.S. (1984), imposes the limitation that a public utility "shall not exercise any right or privilege *under any franchise* ... granted after April 12, 1913, ... without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege." (Emphasis added.) Accordingly, "[e]very applicant for a certificate to exercise franchise rights under section 40-5-102 shall file in the office of the commission such evidence ... to show that such applicant has received the *required* consent, franchise, permit, ordinance, vote, or other authority of the proper ... municipal or other public authority." § 40-5-103(1), 17 C.R.S. (1984) (emphasis added). The constitutional and statutory provisions demonstrate that municipal and PUC consent are necessary to operate a public utility within a home rule city; neither the General Assembly nor its designated agency, the PUC, is empowered to grant a public utility a franchise to

use a home rule city's streets, alleys, and public places in the absence of the municipality's consent.

III.

REA and the trial court relied exclusively on our decision in *City of Englewood v. Mountain States Telephone & Telegraph Co.*, 163 Colo. 400, 431 P.2d 40 (1967) (hereinafter *City of Englewood*). In that case, the telephone company was granted a franchise by Englewood, then a statutory city, to operate its telephone system within the city limits. Englewood subsequently became a home rule city under Colorado Constitution article XX. The twenty-year franchise expired thereafter, and the telephone company refused to seek a new agreement. We held that the telephone company had acquired a state franchise, absolving it of any need to seek a renewal of the city franchise. Our holding was based on sections 50-5-1 and 50-5-8, 3 C.R.S. (1963), which provided:

> **50-5-1. Use of public highways.** Any domestic or foreign telegraph, telephone, electric light power, gas, or pipeline company authorized to do business under the laws of this state or any city or town owning electric power producing or distribution facilities shall have the right to construct, maintain, and operate lines of telegraph, telephone, electric light, wire or power or pipeline along, across, upon and under any public highway in this state, subject to the provisions of this article. Such lines of telegraph, telephone, electric light, wire or power or pipeline shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway.
>
> **50-5-8. Consent necessary to use of streets.** Nothing in this article shall be construed to authorize any person, partnership, association, corporation, or city or town *to*

> *erect* any poles, *construct* any telegraph, telephone, electric light power line, or pipeline, or *extend* any wires or lines along, through, in, upon, under, or over any streets or alleys of any city or incorporated town *without having first obtained the consent of the municipal authorities having power to give the consent of such city or incorporated town.*

(Emphasis as quoted in *City of Englewood.*)

We held that the telephone company

> acquired what in law is a valid state franchise or right by virtue of C.R.S. 1963 50-5-1 and -8. This permitted it not only to maintain its facilities in plaintiff's public ways, but also the right to construct and operate additional ones therein without obtaining a city franchise. In our view the provisions of 50-5-1 are well within the boundaries of [Colo. Const.] Art. XXV and, in addition, we hold that the term "public highway" as used in 50-5-1 is not limited to those highways located outside the boundaries of home rule cities, but must include streets within such cities as well.

City of Englewood, 163 Colo. at 405, 431 P.2d at 42 (citations omitted).

Sections 50-5-1 and -8, 3 C.R.S. (1963), have been recodified in identical language as sections 38-5-101 and -108, 16A C.R.S. (1982). REA maintains that it is an electric light power company within the meaning of section 38-5-101, and that, under our holding in *City of Englewood*, it too is exempt from having to obtain a city franchise. We disagree.

In *City of Englewood*, the telephone company obtained the consent of the city to use its streets when the original franchise was granted in 1943. We held that, having thus

"obtained the consent of the municipal authorities," section 50-5-1 granted the telephone company a state franchise to continue using public highways, *i.e.*, city streets, without acquiring a city franchise. Only this interpretation explains the court's emphasis of the particular words of section 50-5-8, 3 C.R.S. (1963). To hold otherwise would be to interpret *City of Englewood* as ignoring the limitation on the use of public ways by public utilities contained in section 50-5-8 and its successor, section 38-5-108, 16A C.R.S. (1982), and we decline to do so.

In this case, REA has never obtained the consent of the City to use its streets in order to expand its facilities as they existed when Highland Park West was annexed. Indeed, REA sought consent from the qualified electorate and its request was overwhelmingly rejected in the franchise election. REA does not occupy the same position as the telephone company did in *City of Englewood*, and REA does not come under our holding in that case.

IV.

We have never before addressed the issue of the effect of a home rule city's annexation of an area certificated to a rural electric association by the PUC. We considered a somewhat similar scenario in *Union Rural Elec. Ass'n v. Town of Frederick*, [illegible] P.2d 4 (Colo. 1983). Frederick, Colorado is a statutory town that operated a municipally owned electric utility. The town annexed two tracts of land that were within the area certificated to Union Rural Electric Association (Union), and the municipal utility extended its lines to provide electric service requested by new customers in the annexed area. Union brought suit to enjoin Frederick from providing electric service in Union's certificated territory. We noted that "[b] limiting the PUC's jurisdiction, the

Colorado Constitution correspondingly restricts the scope of the rights granted by the PUC to public utilities." *Id.* at 6. We held that "Frederick's annexing of the adjacent territory and its subsequent furnishing of electric service as requested by new customers within the annexed territory was proper and did not constitute a taking of Union's property without due process of law." *Id.* at 9. Our holding was squarely based on Colo. Const. art. XXV's proviso that the vesting of regulatory authority over public utilities in the PUC shall not "be construed to apply to municipally owned utilities."

Town of Frederick provides support for our decision today. Article XXV not only excludes municipal utilities from the jurisdiction of the PUC, its terms also unequivocally state that the municipality's "power to grant franchises" shall remain unaffected. Thus, the authority under which REA operates, derived as it is from the PUC, cannot authorize REA to expand its current system and use city streets without obtaining a municipal franchise.

Our conclusion is consistent with the weight of authority from other jurisdictions that have addressed the issue. Although the statutory and constitutional provisions differ from jurisdiction to jurisdiction, the majority view is that a certificated rural electric association is permitted to continue serving the customers it had on the date of annexation, but that the association is not entitled to build or operate new facilities in the annexed area without first obtaining municipal consent. *See Georgia Power Co. v. Altamaha Rural Elec. Membership Corp.*, 217 Ga. 376, 122 S.E.2d 250 (1961); *Missouri Public Serv. Co. v. Platte-Clay Elec. Coop.*, 407 S.W.2d 883 (Mo. 1966); *Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.*, 253 N.C. 610, 117 S.E.2d 764 (1961); *Caddo Elec. Coop. v. State ex rel. Whelan*, 391 P.2d 234 (Okla. 1964); *City of Abbeville v. Aiken Elec. Coop.*, 287 S.C. 361, 338 S.E.2d 831

(1985); *State ex rel. Southern Gas and Elec. Co. v. Upshur Rural Elec. Coop.*, 156 Tex. 633, 298 S.W.2d 805 (1957); *Tri-City Elec. Ass'n v. City of Gillette*, 584 P.2d 995 (Wyo. 1978); *but see Delta Elec. Power Ass'n v. Mississippi Power & Light Co.*, 250 Miss. 482, 149 So. 2d 504, *cert. denied*, 375 U.S. 77 (1963); *Town of Culpeper v. Virginia Elec. and Power Co.*, 207 S.E.2d 864 (Va. 1974) (both cases holding that municipal annexation cannot affect rural electric association's right to serve current and future members within the utilities' certificated areas).

V.

We hold that REA cannot extend its facilities as they existed at the time of the annexation without obtaining a city franchise for that purpose. REA is entitled to continue operating and maintaining its facilities within the City as they existed at the time the Highland Park West annexation became effective. The district court therefore correctly denied the relief requested by Home Light, but erred in denying the declaratory and injunctive relief requested in the City's amended complaint. Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

[1] The City and Home Light filed the appeal in this court initially, and requested that we take jurisdiction pursuant to section 13-4-102(1)(b), 6 C.R.S. (1973)

[2] Section 40-1-103(2)(a), 17 C.R.S. (1984), states in pertinent part:

> Every cooperative electric association, or nonprofit electric corporation or association, and every other supplier of electric energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of the title.

[3] The parties apparently did not introduce a copy of PUC Decision No. 71606 into evidence. While we are unable to review the language of the PUC's decision, the parties agree that the PUC approved Home Light's exercise of the City franchise rights.

[4] The Highland Park West subdivision constitutes approximately the southwest quarter of Section 15, Township 5 North, Range 66 West, Sixth Principal Meridian, in Weld County, Colorado.

[5] Before Home Light filed Application No. 34000 with the PUC, it had come to the attention of the City that REA was providing electric service to small areas within the municipal boundaries. Representatives of the City and REA began preliminary negotiations to award a franchise to REA to operate within the City limits. The negotiations were held in abeyance when the 1981 PUC proceeding was commenced. After the PUC ruled in favor of REA, the parties once again turned their attention to the matter of a city franchise for REA.

The record reveals that REA originally sought a city franchise on June 2, 1981. After the PUC issued its decision dismissing Home Light's Application No. 34000, REA advised the City that it sought a "permit" rather than a franchise in order to operate within the City boundaries. REA objected to and declined to participate in the special franchise election.

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[6] City Charter section 18.3 conformed to the Colorado Constitution's limitations on the granting of franchises by home rule cities. At all times relevant to this decision, Colo. Const. Art. XX, § 4 provided:

> No franchise relating to any street, alley or public place . . . shall be granted except upon the vote of the registered electors . . . .

Although article XX, section 4 by its terms applies only to the City and County of Denver, its provisions are made applicable to other home rule municipalities by article XX, section 6.

In November 1986, the voters of Colorado amended Colo. Const. Art. XX, § 4 to eliminate the requirement that franchise questions be automatically submitted to a vote. The amendment explicitly states, however, that the award of any franchise is subject to the powers of initiative and referendum. The current version of Art. XX, § 4 states in pertinent part:

> (4) Any franchise relating to any street, alley, or public place of the said city and county shall be subject to the initiative and referendum powers reserved to the people under Section 1 of Article V of this constitution. Such referendum power shall be guaranteed notwithstanding a recital in an ordinance granting such franchise that such ordinance is necessary for the immediate preservation of the public peace, health, and safety. Not more than five percent of the registered electors of a home rule city shall be required to order such referendum. Nothing in this section shall preclude a home rule charter provision which requires a lesser number of registered electors to order such referendum or which requires a franchise to be voted on by the registered electors . . . .

See House Concurrent Resolution No. 1002, § 1, 1986 Colo. Sess. Laws 1239, 1240. The governor proclaimed the passage of the amendment after the election results were tabulated and certified. Executive Order, "Proclamation Certifying Vote on Certain Measures," 2, ¶ 3 (December 17, 1986).

The constitutional amendment does not affect our resolution of this case.

APPENDIX B

DISTRICT COURT, WELD COUNTY, COLORADO
Civil Action No. 82 CV 617

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

CITY OF GREELEY, COLORADO, a municipal corporation, and HOME LIGHT AND POWER, INC., a Colorado corporation,

Plaintiffs,

vs.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Defendant.

FINDINGS OF FACT

1. Plaintiff Greeley is a home rule city organized pursuant to Article XX Section 6 of the Constitution of the State of Colorado.

2. On June 18, 1968, plaintiff Greeley granted to plaintiff Home Light a franchise giving to said plaintiff Home Light the right to provide electric service within the plaintiff city. That franchise was confirmed by order of the Colorado Public Utilities Commission dated July 18, 1968.

3. Plaintiff Home Light is a private corporation operating an investor-owned utility business. It is not a municipally-owned utility.

4. Defendant is a cooperative electric association and is a public utility by virtue of C.R.S. 40-1-103(2).

Civil Action No. 82 CV 617

5. On April 3, 1970, the Colorado Public Utilities Commission entered its decision No. 74664 dividing territory in Weld County, Colorado, between plaintiff Home Light and defendant.

6. The division of territory provided for in said order was made pursuant to an agreement negotiated between defendant and plaintiff Home Light.

7. At the time of the Colorado Public Utilities Commission order no part of the territory assigned to defendant was within the corporate boundaries of plaintiff Greeley.

8. Subsequent to the granting of the franchise mentioned in paragraph 2 above and the entry of Colorado Public Utilities Commission decision No. 74664, plaintiff Greeley annexed certain territory assigned to defendant by that decision.

9. The charter of plaintiff Greeley designates firms operating electric light systems as public utilities and authorizes the granting of franchises by majority vote of taxpaying electors, but does not specifically require a public utility to have a franchise.

10. On June 2, 1981, defendant proposed a franchise agreement with plaintiff Greeley providing for service to those parts of the city located in defendant's certificated area.

11. On May 18, 1982, defendant Greeley adopted Ordinance No. 26, 1982, making it a violation to maintain or install on any street, alley, sidewalk or other public place any electrical transmission equipment without a franchise.

12. At an election held July 13, 1982, plaintiff Greeley submitted to its taxpaying electors a proposed franchise

purporting to give defendant the right to operate throughout the city.

13. Defendant did not participate in the franchise election.

14. In the franchise election the proposal for a franchise for defendant was defeated.

15. Defendant is willing to serve the portion of plaintiff Greeley located in its certificated area on the same terms as provided by plaintiff Home Light & Power in the remainder of the city.

16. The defendant serves about 17,000 customers in Boulder, Larimer and Weld counties. Its headquarters is in Fort Collins, Larimer County, Colorado. About six of its customers are located in Greeley, Colorado.

17. The defendant secures its power through a cooperative arrangement with other utility associations which are state-wide and interstate in extent.

18. The defendant's utility business is of state-wide concern. Its predominant epicenter is not limited to a local focus, and particularly is not limited to plaintiff city.

19. Plaintiff Home Light filed application No. 34,000 with the Colorado Public Utilities Commission seeking to have defendant expelled from any territory within plaintiff Greeley on the basis of Home Light's franchise with the City of Greeley.

20. Plaintiff Greeley intervened in application No. 34,000 and supported the position of plaintiff Home Light.

21. On March 30, 1982, the Colorado Public Utilities Commission entered its order denying application No. 34,000.

22. Plaintiff Home Light's filing of application No. 34,000 in the PUC was a good faith effort and its action in participating in these proceedings is a good faith effort before this court. Neither action is a breach of any contract which plaintiff Home Light may have with defendant, nor was either action frivolous nor without reasonable foundation.

23. The question of annexations was brought up in the negotiations which led to the stipulation and to Colorado Public Utilities Commission Order No. 74664. Such negotiations did not finally resolve the question of which should serve in annexed areas. It was the view of plaintiff Home Light that it has the right to serve in annexed territories even though such right was not set forth in the stipulation dividing territories. Such view was not unreasonable even though incorrect.

24. Because of the unsettled condition of the law at the time of the negotiations between plaintiff Home Light and defendant regarding division of territory, it was reasonable for them to negotiate concerning the expansion of the plaintiff Greeley even though no specific mention of such expansion was made in the stipulation for settlement.

25. Plaintiff Home Light's actions in connection with the election of June 13, 1982, were reasonable and did not manifest any bad faith regarding its contract with defendant.

26. Greeley mayor Michael Lehan opposed service in plaintiff Greeley by defendant both as a result of its adverse effect upon his personal financial interest and his philosophical view that it should not be serving within the city of Greeley.

27. Greeley councilmember Warren Terry opposed extension of service within plaintiff Greeley by defendant but felt it had a right to maintain its current customers.

28. Greeley councilmember Irma Princic expressed reservations concerning defendant's service within plaintiff Greeley on the basis of comparative interest factors.

29. The position of the remaining councilmembers or mayors concerning service by defendant within plaintiff Greeley could not be determined from the evidence.

30. Mr. Mike Geile, general manager of plaintiff Home Light, discussed with officials of plaintiff Greeley the viewpoint of plaintiff Home Light and the position he felt that plaintiff Greeley should take.

31. There exists no other evidence to support the claim for relief based on conspiracy.

32. Action was postponed on defendant's request for a franchise agreement in July, 1981, during the proceedings on application No. 34,000 before the Colorado Public Utilities Commission. This postponement was to maintain the status quo.

33. The intervention of plaintiff Greeley in application No. 34,000 before the Colorado Public Utilities Commission was undertaken at the behest of the Colorado Municipal League, not of plaintiff Home Light.

34. Although the officials of plaintiff Greeley favored and continue to favor service by plaintiff Home Light within the plaintiff city, their conduct leading to and including the election of July 13, 1982, was within the bounds of their discretion and involved no actionable impropriety.

35. To allow the expulsion of a electric utility from portions of its certificated territory by virtue of annexation of that territory by a municipality which franchises another utility would create serious problems. It would handicap the certificated electric utility in providing suitable service to its territory because long term planning would be difficult or impossible. Large scale investment in plant and equipment could not be jusitified [sic] if the utility were subject to expulsion at the whim of adjoining cities. These and other similar considerations would prevent adequate service to rural territory in the vicinity of expanding cities.

CONCLUSIONS OF LAW

1. The evidence does not support the claims of plaintiffs for injunctive relief.

2. The evidence is insufficient to establish the counterclaims of defendant based on conspiracy or breach of contract.

3. Decision No. 74664 of the Colorado Public Utilities Commission dividing territory in Weld County, Colorado, between plaintiff Home Light and defendant is equivalent to a state franchise for defendant to provide electric service to the territory assigned to it.

4. Plaintiff Greeley does not have the power to require a city franchise as a condition for service by defendant in the portions of plaintiff Greeley lying within the area assigned to defendant by the Colorado Public Utilities Commission decision No. 74664.

5. Plaintiff Home Light may not provide electric service to those portions of plaintiff Greeley lying within the area

assigned to defendant by decision No. 74664 of the Colorado Public Utilities Commission.

6. The issues of the right of plaintiff Greeley to exercise its police power to tax or to impose reasonable charges and assessments are not within the issues litigated in this case and no determination is made concerning them.

IT IS ORDERED, ADJUDGED and DECREED by the court as follows:

1. All claims of each party for relief other than declaratory relief and costs are DENIED.

2. The court makes the following declarations:

(A) The plaintiff City of Greeley, Colorado, has no power to require a city franchise as a condition to the continuation or expansion of the electric service provided by the defendant Poudre Valley Rural Electric Association, Inc., in any area which was awarded to that defendant by decision No. 74664 of the Colorado Public Utilities Commission dated April 3, 1970, dividing territory in Weld County, Colorado, between defendant and plaintiff Home Light and Power Company and which area has been or shall hereafter be annexed to plaintiff City of Greeley. Any provisions of the charter or ordinances of the plaintiff City of Greeley requiring such a franchise are void as against defendant.

(B) Regardless of the terms of its city franchise from plaintiff City of Greeley, plaintiff Home Light and Power Company may not provide electric service to the portions of plaintiff City of Greeley lying within the area which was awarded to defendant Poudre Valley Rural Electric Association, Inc., by decision No. 74664 of the Colorado Public Utilities Commission dated April 3, 1970, dividing territory in

Civil Action No. 82 CV 617

Weld County, Colorado, between defendant and plaintiff Home Light and Power Company.

3. Defendant shall have judgment for its costs.

DATED July 18, 1985.

BY THE COURT:

/s/ Robert A. Behrman
District Judge

APPENDIX C

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

• • •

IN THE MATTER OF THE APPLICATION OF HOME LIGHT AND POWER COMPANY, 810 NINTH STREET, GREELEY, COLORADO, FOR CLARIFICATION AND RECONCILIATION OF CONFLICTING PROVISIONS IN CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY HELD BY IT AND BY POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.	APPLICATION NO. 34000

APPLICATION

The Applicant respectfully states:

1. Applicant is an operating public utility subject to the jurisdiction of this Commission engaged, *inter alia*, in the purchase, distribution and sale of electric power and energy to domestic, commercial, and industrial customers in the City of Greeley, Colorado, and contiguous areas in the County of Weld.

2. The City of Greeley is a Home Rule City, organized and existing under Article XX of the Constitution of the State of Colorado.

3. At an election held June 18, 1968, the taxpaying electors of the City of Greeley approved the grant of a franchise to Applicant for the distribution and sale of electricity for a term of twenty-five (25) years within the City of Greeley.

4. Under the terms of the aforesaid franchise, Applicant was granted the right, privilege and authority to locate, build, extend, maintain and operate facilities for the transmission and distribution of electric energy and to sell and distribute electric energy within the City and to the inhabitants thereof, over, through and across the streets, alleys, roads and other public ways within the City, and "as may be hereinafter laid out, opened, located or constructed within the territory now or hereinafter included within the boundaries of said City". It was further agreed that the Applicant would "furnish electric energy within the corporate limits of the City as such limits now exist or may during the term of this franchise be extended".

5. By Decision No. 71606 of this Commission, dated July 18, 1968, it was found that "... the public convenience and necessity require and will require the exercise by Home Light and Power of the franchise rights approved by the voters of the City of Greeley as set forth in ..." the aforesaid franchise ordinance. Such Order constituted a certificate of public convenience and necessity therefor.

6. In reliance upon the grant to it of the aforesaid franchise by the City of Greeley and the aforesaid Order of this Commission, authorizing the exercise of such franchise rights, Applicant has maintained and improved its electric distribution system in the City of Greeley sufficient to serve its customers located therein and customers located in areas annexed to the City. Such annexations have occurred since the franchise was granted to Applicant in 1968 and Applicant has extended service within such annexed areas.

7. On April 3, 1970, by Decision No. 74654, a Recommended Decision was entered by an Examiner (which subsequently, by operation of law, became the decision of this Commission) under the terms of which a territorial division was made between Applicant and Poudre Valley Rural Electric Association, Inc., ("Poudre Valley") setting forth areas for electric service for each electric utility in the County of Weld, State of Colorado. Poudre Valley is a cooperative electric association subject to the jurisdiction, control, and regulation of this Commission which renders electric service in portions of Larimer, Weld and Boulder Counties, Colorado.

8. By reason of annexations by and to the City of Greeley, the municipal limits of the City of Greeley are now approaching that territory certified by the Commission in the aforesaid Commission Decision No. 74654 to be served by Poudre Valley and, in fact, a recent annexation by the City of Greeley included territory certificated to be served by Poudre Valley under the terms of the aforesaid Decision No. 74654.

9. Article XXV of the Constitution of the State of Colorado, which is the constitutional provision under which the Public Utilities Commission of the State of Colorado derives its power and authority, provides in pertinent part as follows: "... nothing herein shall affect the power of municipalities to exercise reasonable police and licensing power nor their power to grant franchises; ...". By reason of the foregoing limitation on its powers, this Commission is without lawful authority to interfere with or limit the franchise agreement between the City of Greeley and Applicant, or to authorize any continuation or extension of electric service by Poudre Valley within the municipal limits of the City of Greeley.

10. The public interest and the interest of the citizens of the City of Greeley will be served if the utility franchised to serve within the City of Greeley, Applicant, is authorized to extend electric service into areas annexed by the City of Greeley, even though such areas may be within territories otherwise authorized to be served by Poudre Valley. The public convenience and necessity requires that Applicant be authorized to fully perform its obligations under the franchise granted to it by the taxpaying electors of the City of Greeley.

11. Applicant is ready, willing and able to render electric service to all of the inhabitants, customers, and businesses located within the City of Greeley as the municipal boundaries thereof exist or may hereinafter be enlarged, all as authorized and required by the franchise granted to Applicant by the City of Greeley and the aforesaid Decision No. 71606 of this Commission authorizing the exercise of such franchise rights.

WHEREFORE, Applicant asks that the Public Utilities Commission of the State of Colorado enters an Order clarifying and limiting the rights of Poudre Valley under the aforesaid Decision No. 74654 and limiting the right of Poudre Valley to extend service to new customers when such customers are located within the municipal boundaries of the City of Greeley.

DATED at Denver, Colorado, this 15th day of July, 1981.

KELLY, STANSFIELD
& O'DONNELL

By /s/ Donald D. Cawelti
Donald D. Cawelti — #2838
550 15th Street — Suite 900
Denver, Colorado 80202
Telephone: 825-3534

ATTORNEYS FOR
APPLICANT
HOME LIGHT AND POWER
COMPANY

APPENDIX D

(Decision No. C32-459)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF HOME LIGHT AND POWER COMPANY 810 NINTH STREET, GREELEY, COLORADO, FOR CLARIFICATION AND RECONCILIATION OF CONFLICTING PROVISIONS IN CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY HELD BY IT AND BY POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.	APPLICATION NO. 34000 ORDER OF THE COMMISSION DENYING EXCEPTIONS AND ENTERING INITIAL DECISION

March 30, 1982

STATEMENT OF THE CASE

BY THE COMMISSION:

By application filed July 15, 1981, Home Light and Power Company seeks an order from this Commission recognizing it as the only electric distribution utility authorized to serve pursuant to franchise, in recently annexed areas of the City of Greeley, which recently annexed areas lie in whole or in part within the certificated territory of Poudre Valley Rural Electric Association. Home Light requests that this Commission enter an order expelling Poudre Valley Rural Electric Association from all areas located within the municipal boundaries of the City of Greeley. On July 20, 1981, the

Commission sent notice to all who might desire to protest, object or intervene in the within matter.

On August 3, 1981, Union Rural Electric Association, Inc., petitioned for leave to intervene, which petition was granted on August 14, 1981. Similarly, on August 10, 1981, the Colorado Rural Electric Association (CREA) filed a motion for leave to intervene; permission to intervene was granted on August 14, 1981. On August 19, 1981, Poudre Valley Rural Electric Association, Inc., protested the application. Possibly because said protest may have been untimely, Poudre Valley also moved to intervene in the within matter on October 16, 1981, and said intervention was permitted on October 30, 1981.

Originally scheduled for hearing in October, 1981, the matter was finally heard on December 21, 1981, by Examiner Arthur G. Staliwe. At the conclusion of Applicant's case, the application was dismissed.

On January 12, 1982, Examiner Arthur G. Staliwe issued Recommended Decision No. R82-44 which recommended that the application be denied.

Home Light and Power filed exceptions to Recommended Decision No. R82-44 on March 8, 1982. By the exceptions, Home Light and Power contends that the right of Home Light and Power to serve all territories within the municipal boundaries of Greeley under its franchise from Greeley, is paramount to the right of Poudre Valley REA to serve such areas pursuant to a certificate of public convenience and necessity issued by this Commission. Home Light and Power also contends that the Examiner erred in requiring proof of the unwillingness or inability of Poudre Valley to provide service in certain areas of Greeley, before requiring it to cease extending service in the city limits of Greeley where it has no franchise. Union REA filed response to the exceptions

of Home Light on March 19, 1982. Poudre Valley REA filed response to exceptions on March 18, 1982.

On March 18, 1982, CREA filed a motion for extension of time to file reply to exceptions. This motion was granted on March 29, 1982 by Executive Ruling No. ER82-117. CREA filed its response on March 26, 1982.

Although the Commission is not in complete disagreement with the Recommended Decision of the Examiner, for purposes of clarity the Commission will enter its order containing its own findings of fact, conclusions on findings of fact and order without regard to Recommended Decision No. R82-44.

FINDINGS OF FACT AND CONCLUSIONS THEREON

Based upon all the evidence of record, the following facts are found and conclusions are drawn:

1. In July, 1968, the Commission specifically approved Home Light and Power Company (Home Light) exercising a franchise for the purchase, transmission, distribution and sale of electricity in the City of Greeley. The twenty-five year franchise provided in pertinent part:

> "The Company shall furnish electric energy within the corporate limits of the city as such limits now exist or may during the term of this franchise be extended, . . ."

Poudre Valley Rural Electric Association, Inc. (Poudre Valley) was a protestant in that proceeding. See Exhibit 2, Decision No. 71606, July 18, 1968.

2. In 1970, Home Light and Poudre Valley entered into an agreement as to the boundaries of the territory which each would be certificated to serve on an exclusive basis. *The Commission gave effect to this agreement in Decision No. 74654,*

dated April 3, 1970. See Exhibit 8. As pertinent here, territory to the southwest of the 1970 city limits of Greeley was certificated to Poudre Valley.

3. In 1981, the city of Greeley annexed two parcels of land to the south and west of the then-city limits of Greeley, portions of which annexations lie within the certificated service territory of Poudre Valley. See Exhibits 3, 4 and 5. It is these recent annexations that Home Light seeks to have Poudre Valley expelled from, and have it declared to be the only lawful electric distribution utility pursuant to its 1968 franchise.

4. Poudre Valley REA is a certificated electric distribution utility and Home Light and Power Company seeks to have Poudre Valley's certificate diminished by the amount of land annexed by the City of Greeley in 1982. No showing was made in this proceeding that Poudre Valley is unwilling or unable to serve in the certificated area in question, nor was any showing made that the public convenience and necessity requires a change in utilities.

5. A certificated area constitutes a property right which cannot be taken away except by due process of law. CRS 1973, 40-5-101(2). Due process of law is met where there is substantial evidence of record to support a finding that the certificated utility is unwilling or unable to serve its certificated area, and the public convenience and necessity requires a change.

6. The record in this proceeding fails to establish unfitness on the part of Poudre Valley to serve the area in question, and no need on the part of the public for a change of utility was established. This application should therefore be dismissed.

7. Home Light contends by its exceptions that it obtained a franchise from Greeley to provide utility service within the Greeley municipal boundaries. Home Light further contends that this right extends to future annexations of the city, and areas certificated to Poudre Valley outside of such area must give way to the franchise right. The Commission need not decide whether this abstract statement by Home Light is legally correct, [sic] time in any event this contention disregards the 1970 agreement between Home Light and Poudre Valley, where these parties agreed to serve certain areas on an exclusive basis. By the 1970 agreement, territory to the south and west of the 1970 city limits of Greeley, the area involved in this proceeding, was to be served by Poudre Valley on an exclusive basis. The Commission gave specific approval and effect to this agreement in Decision No. 74654, dated April 3, 1970. Accordingly, Home Light and Power voluntarily surrendered its right to serve in the area in question. Therefore, the exceptions of Home Light should be overruled and denied.

An appropriate Order will be entered.

ORDER

THE COMMISSION ORDERS THAT:

1. The exceptions of Home Light and Power Company to Recommended Decision No. R82-44, filed on March 8, 1982, are overruled and denied.

2. Application No. 34000 of Home Light and Power Company is denied.

This Order shall be effective twenty-one (21) days from the day and date hereof.

DONE IN OPEN MEETING the 30th day of March, 1982.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

EDYTHE S. MILLER

DANIEL E. MUSE

L. DUANE WOODARD
Commissioners

ATTEST: A TRUE COPY

/s/ Harry A. Galligan, Jr.
Executive Secretary

APPENDIX E

SUPREME COURT, STATE OF COLORADO
CASE NO. 85SA293
APPEAL FROM THE DISTRICT COURT, WELD COUNTY, #82CV617

ORDER OF COURT

THE CITY OF GREELEY, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Plaintiffs-Appellants,

vs.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,

Defendant-Appellee.

Upon consideration of the Request to Enter Mandate filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Request shall be, and the same hereby is, GRANTED.

BY THE COURT, NOVEMBER 20, 1987

cc: Don K. DeFord, Esq.
109 8th Street, Suite 300
Glenwood Springs,
Colorado 81601

John P. DiFalco, Esq.
Edward "Jed" M. Caswall
919 Seventh Street
Greeley, Colorado 80631

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

NOV 20 1987

MAC V. DANFORD
Clerk of the
Supreme Court
By /s/ Delsa B. Denlow
Deputy Clerk

Randolph W. Starr, Esq.
Kenneth L. Starr, Esq.
717 17th Street, #2440
Denver, Colorado 80202

John Conway, Esq.
4704 Harlan Street, Suite 500
Denver, Colorado 80212

Gerald Dahl, Esq.
Tami Tonoue, Esq.
Colorado Municipal League
1500 Grant Street, Suite 200
Denver, Colorado 80203

James R. McCotter, Esq.
James K. Tarpey, Esq.
550 Fifteenth Street, Suite 900
Denver, Colorado 80202

Paula M. Connelly, Esq.
Joseph B. Wilson, Esq.
1401 Seventeenth Street,
Suite 1100
Denver, Colorado 80217

Duane Woodard,
Attorney General

APPENDIX F

SUPREME COURT, STATE OF COLORADO
Case No. 85SA293

NOTICE

THE CITY OF GREELEY, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Plaintiffs-Appellants,

vs.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,

Defendant-Appellee.

Please be advised that the Remittitur in the above entitled action and matter was issued on November 23, 1987.

cc: Don K. DeFord, Esq.
John P. DiFalco, Esq.
Edward "Jed" M. Caswall, Esq.
Randolph W. Starr, Esq.
Kenneth L. Starr, Esq.
John Conway, Esq.
Gerald Dahl, Esq.
Tami Tonoue, Esq.
James R. McCotter, Esq.
James K. Tarpey, Esq.
Paula M. Connelly, Esq.
Joseph B. Wilson, Esq.
Duane Woodard

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

NOV 23 1987

MAC V. DANFORD
Clerk of the Supreme Court

By /s/ Delsa B. Denlow
Deputy Clerk

APPENDIX G

SUPREME COURT, STATE OF COLORADO
Case No. 85SA293
Appeal from the District Court,
Weld County, #82CV617

ORDER OF COURT

THE CITY OF GREELEY, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Plaintiffs-Appellants,

vs.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,

Defendant-Appellee.

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions for Rehearing shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC. October 5, 1987.

cc: Edward "Jed" M. Caswall
Donald D. Cawelti
James K. Tarpey
Kenneth L. Starr
Ann Livedalen
John J. Conway
Gerald E. Dahl
Tami A. Tanoue
Paula M. Connelly
Joseph B. Wilson
Randolph W. Starr

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

OCT 5 1987

MAC V. DANFORD
Clerk of the Supreme Court
By /s/ Helen Gantz
Deputy Clerk

APPENDIX H

FILED IN THE
SUPREME COURT
OF THE STATE OF
COLORADO
DEC 30 1987
MAC V. DANFORD,
CLERK

SUPREME COURT, STATE OF COLORADO

Case No. 85SA293

**APPEAL FROM THE DISTRICT COURT,
WELD COUNTY, #82CV617**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

THE CITY OF GREELEY, a municipal corporation, and HOME LIGHT & POWER COMPANY, a Colorado corporation,

Plaintiffs-Appellants,

v.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,

Defendant-Appellee.

Notice is hereby given that Poudre Valley Rural Electric Association, Inc. ("Poudre"), the Appellee in the above-captioned case, hereby appeals to the Supreme Court of the United States from the judgment of the Colorado Supreme Court contained in the Colorado Supreme Court's September 8, 1987 opinion which became final on October 5, 1987 by

virtue of the Court's October 5, 1987 Order Denying Petitions for Rehearing.

The September 8, 1987 opinion reversed the judgment of the District Court in and for the County of Weld (19th Judicial District) that Poudre did not need a franchise from the City of Greeley ("Greeley") because it had a franchise from the State of Colorado and held that, even though Poudre had a franchise from the State of Colorado, Poudre must obtain a franchise from Greeley "if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated territory that was annexed by the City."

By virtue of its September 8, 1987 Opinion and the denial of Poudre's Petition for Rehearing in its October 5, 1987 Order, the Colorado Supreme Court has upheld the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the City of Greeley Charter, notwithstanding Poudre's contentions that they were repugnant to the Constitution and laws of the United States, as well as the validity of the Colorado Supreme Court's action in resolving Poudre's defenses against it on appeal without due process of law.

Poudre appeals from the entirety of this final judgment, except that portion of the September 8, 1987 Opinion that holds that Poudre "is not required to obtain a city franchise to operate and maintain its electric distribution system within the City as it existed at the time of the annexation."

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: December 30, 1987

HOLMES & STARR
A Professional Corporation
Kenneth L. Starr (246)
Ann Livedalen (7232)

RANDOLPH W. STARR, P.C.
Randolph W. Starr (3183)
221 East 29th Street, #220
P.O. Box 642
Loveland, Colorado 80539
(303) 667-1029

By /s/ Kenneth L. Starr
Attorneys for Poudre Valley
Rural Electric Association, Inc.
717 17th Street, Suite 2440
Denver, Colorado 80202
(303) 292-1500

APPENDIX I

SUPREME COURT, STATE OF COLORADO
Case No. 85-SA-293

APPELLEE'S PETITION FOR REHEARING WITH RESPECT TO THE EN BANC SEPTEMBER 8, 1987 JUDGMENT, JUSTICE ERICKSON DELIVERING THE OPINION OF THE COURT

THE CITY OF GREELEY, COLORADO, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Plaintiffs-Appellants,

v.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Defendant-Appellee.

Appeal Directly to the Colorado Supreme Court Pursuant to § 13-4-102(1)(b), 6 C.R.S. (1973)

from the DISTRICT COURT, WELD COUNTY, No. 82-CV-617 The Honorable Robert A. Behrman

---

DATED: September 22, 1987.

HOLMES & STARR
A Professional Corporation
Kenneth L. Starr (246)
Ann Livedalen (7232)
717 Seventeenth Street
Suite 2440
Denver, Colorado 80202
(303) 292-1500

RANDOLPH W. STARR, P.C.
Randolph W. Starr (3183)
221 East 29th St.,
Suite 220
P.O. Box 642
Loveland, Colorado 80539
(303) 667-1029

Attorneys for Appellee

Appellee Poudre Valley Rural Electric Association, Inc. ("Poudre") respectfully petitions the Court pursuant to C.A.R. 40 for a rehearing on the following grounds:

1. The Court's September 8, 1987 Opinion (the "Opinion") overlooks *substantial* unresolved defenses (listed in the Appendix hereto) which could not be presented on appeal because the District Court concluded that the City of Greeley ("Greeley") lacked power to require a city franchise because Poudre had a franchise from the State and therefore did not reach all of Poudre's defenses. Greeley has conceded these defenses must be resolved before the relief it seeks can be granted. *See* pp. 16-17 of Greeley's "Answer Brief to Defendant's Memorandum . . ." Vol. 3[1], pp. 722-23 and Greeley's Trial Data Certificate, Vol. 2, p. 654.

Two examples show the need to either modify the Opinion or to remand to the District Court to make findings of fact and conclusions of law with respect to these defenses, as Poudre requested at page 29 of its Brief on Appeal.

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[1] Record references are to the volume and page number, *e.g.*, Vol. __, p. __.

A. *The Impairment of Contract Defense*[2]. In *Russell v. Sebastian*, 233 U.S. 195 (1914), the United States Supreme Court held the contract between the utility and the State, created by the utility laying lines and preparing to serve a geographic area, permitted the utility to not only continue to maintain its existing facilities, but to expand them.

> [W]e find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service .... In this view, *the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city*. (Citations omitted. Emphasis added.) 233 U.S. at 208.

The undisputed facts with respect to Poudre's acceptance of the State's offer in § 38-5-101, C.R.S. ("§ 38-5-101") to "construct, maintain and operate" its electrical distribution system on the streets of the State of Colorado (*see* page 5, *infra*), show that the Opinion overlooks *Russell v. Sebastian*, *supra*. Both Poudre and the telephone company accepted the offer from the State found in § 38-5-101 (at a time when § 38-5-108, C.R.S. ["§ 38-5-108"] had been held to mean that a city expressed its consent through the reasonable exercise of its police power) and therefore are entitled as a matter of Federal Constitutional law to expand their facilities.

B. *The Supremacy Clause Defense*. It is undisputed that all of Poudre's assets including those in areas annexed by Greeley have been mortgaged to the Rural Electrification Admin-

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[2] U.S. Const. Art. I, § 10 and Colo. Const. Art. II, § 11.

istration (the "R.E.A.").[3] Moreover, the Trial Court found that granting the relief requested by Greeley *"would prevent adequate service to rural territory in the vicinity of expanding cities."*(Emphasis added). ¶ 35 at Vol. 3, p. 1029. Consequently, granting the relief requested by Greeley violates the Supremacy Clause contained in Article VI of the United States Constitution. *See P.U.D. No. 1 v. United States*, 417 F.2d 200, 201 (9th Cir. 1969).

Poudre is entitled to an adjudication on these and other unresolved defenses. The Opinion, however, has ruled against Poudre on these defenses even though they were not before the Court and in so doing has violated Poudre's due process rights under the United States and Colorado Constitutions.

2. The Opinion distinguishes *Englewood*[4] on the basis that the telephone company once had a city franchise, even though it was refusing to renew it after its expiration. The *Englewood* distinction is unsupported. *Englewood* held that the telephone company,

> *regardless of the validity of its original city franchise (a point we need not decide), acquired what in law is a valid state franchise or right by virtue of C.R.S. 1963, 50-5-1 and 8.* [Now § 38-5-101 and § 38-5-108]. *This permitted it* not only to maintain its facilities in plaintiff's public ways,

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[3] *See* Poudre's Trial Exhibit 88 and the testimony of Poudre's General Manager, Ronald J. Carey, at Vol. 8, p. 113, line 18 through p. 114, line 17. All exhibits were admitted by stipulation, Vol. 5, p. 47, lines 15-22. References to Exhibits herein are to Trial Exhibits.

[4] *City of Englewood v. Mountain States Telephone and Telegraph Co.*, 163 Colo. 400, 431 P.2d 40 (1967).

> but also the right *to construct and operate additional ones therein without obtaining a city franchise.*
>
> • • •
>
> . . . *Thus Article XX has no application here.* (Emphasis added.) 163 Colo. at 405, 407, 431 P.2d at 42-43.

The basis for permitting the telephone company to not only maintain but expand its existing facilities was § 38-5-101 and not (as the Opinion holds) that the telephone company once had a franchise from the City.

3. *Englewood* held that where the entity seeking consent has a franchise from the State, the city is (a) "powerless to require a further franchise," 163 Colo. at 406, 431 P.2d at 43, and (b) expresses its consent through its exercise of the police power.

> We point out that C.R.S. 1963, 50-5-8 [now § 38-5-108] is perfectly consistent with defendant's position that *the city may require, under its police power, reasonable acts on the part of anyone using its streets.* For example, *it can require the securing of a permit or license,* with attending fee requirements, *prior to the erection of a new pole* in a certain place *or* the extension of a *wire* along a particular street or the reasonable regulation of objects *which may be placed in its streets and alleys.* 163 Colo. at 409, 431 P.2d at 43. (Emphasis added.)

This holding in *Englewood* is consistent with the language differences in § 38-5-101 and § 38-5-108. While § 38-5-101 is a grant of permission to "construct, maintain and operate," the "consent" required by § 38-5-108 is to "erect," "construct" or extend." Significantly, city consent is not required to "use" city streets.

Poudre did not need and therefore did not seek a franchise. Thus, the Opinion incorrectly states "REA sought consent from the qualified electorate and its request was overwhelmingly rejected in the franchise election." (Opinion, p. 18.) Not only did Poudre not seek an election, but Greeley, contrary to its Ordinance 26, 1982 (Exhibit 62), conducted the election without Poudre's request or tender of the election cost deposit required by Section 18-3 of Greeley's Charter (Exhibit 96).[5] Indeed, in contrast to the Opinion's incorrect statement at page 18, the last sentence of note 5 of the Opinion correctly stated that "REA objected to and declined to participate in the special franchise election."

4. The evidence was uncontroverted that, before Greeley commenced annexing Poudre's territory in 1981, Poudre had constructed 2,400 miles of lines including lines running through Greeley.[6] Construction of Poudre's system began pursuant to a 1940 permit from Weld County (*see* Exhibit 103), 18 years before Greeley became a home rule city in 1958 (*see* Exhibit 96), and 42 years before Greeley enacted franchise Ordinance 26, 1982 (Exhibit G). Thus even if the Opinion's *Englewood* distinction were sound it doesn't fit the facts here because Poudre like the telephone company had all required consents before it began construction.

5. The Opinion's new construction of § 38-5-101 and § 38-5-108 is based upon authorities from other jurisdictions, whose law is critically different from the Colorado statutes and Constitution. *See, e.g. State v. Upshur Rural Electric Cooperative Corp.*, 156 Tex. 633, 298 S.W.2d 805 (1957),

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[5] *See e.g.*, Vol. 6, p. 130, line 7, through p. 131, line 14 and Exhibit 57.

[6] *See, e.g.*, Vol. 6, p. 156, lines 10-12 and lines 18-25; Vol. 8, p. 112, line 23 through p. 113, line 5; Vol. 8, p. 147, line 6 through p. 151, line 18; Vol. 10, p. 38, line 6 through p. 41, line 14.

whose holding is premised on the Texas Electric Cooperative Corporation Act which limited an Electric Cooperative Corporation's service to cities with fewer than 1,500 inhabitants. Compare § 40-9.5-101, *et seq*, C.R.S.

6. The Opinion's new construction of § 38-5-108 frustrates a utility's power of eminent domain by subjecting utilities to city veto power. *Cf. Town of Sheridan v. Valley Sanitation District*, 137 Colo. 315, 322, 324 P.2d 1038, 1042 (1958). ("The right of eminent domain and the absolute right of veto on the part of a municipality to the exercise of that right presents an irreconcilable conflict.") Under the Opinion, Poudre must treat Greeley as a closed island around which Poudre must run its lines to bring service from one side of Greeley to its territory on the other. (*See* service area map in pocket of Exhibit 114 and Exhibit JJJJ.)

7. The Opinion also unintentionally overrules the long line of Colorado cases (*see* Poudre's April 16, 1986 Brief on Appeal, pp. 15-22) holding that public utility regulation is a matter of state wide concern and overrules the *Englewood* holding that a home rule city's power to grant franchises referred to in Articles XX and XXV of the Colorado Constitution pertains only to matters of local concern. The preservation of the power to grant franchises must be viewed from the vantage point of 1954 when the people adopted Article XXV. By 1954, both the *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 F. 5 (8th Cir. 1907) and *Baker v. Denver Tramway Co.*, 72 Colo. 233, 210 P. 845 (1922) cases had been decided and so it was known the municipal franchise power did not extend to situations where a state franchise was in place. The Opinion also overlooks the Trial Court's findings 16 through 18 and 35 (Vol. 3, p. 1027 and p. 1029), that Poudre's activities are a matter of state wide and not merely local concern.

DATED: September 22, 1987.

RANDOLPH W. STARR, P.C.
Randolph W. Starr (3183)

By /s/ Randolph W. Starr
221 East 29th St., #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

HOLMES & STARR
A Professional Corporation
Kenneth L. Starr (246)
Ann Livedalen (7232)

By /s/ Kenneth L. Starr
717 Seventeenth Street
Suite 2440
Denver, CO 80202
(303) 292-1500

APPENDIX

POUDRE VALLEY'S UNRESOLVED DEFENSES TO CITY'S COMPLAINT AND AMENDED COMPLAINT[1]

1. City of Greeley Ordinance No. 26, 1982, on its face and as applied to the Defendant is unreasonable, arbitrary and capricious and bears no rational relation to any proper legislative object and therefore is unconstitutional under the due process clauses of the United States and Colorado Constitutions. ¶ 67, Vol. 1, pp. 90-91.

2. City of Greeley Ordinance No. 26, 1982, on its face and as applied denies Defendant the equal protection of the laws in violation of the Colorado and United States Constitutions. ¶ 68, Vol. 1, p. 91.

3. Retrospective application of City of Greeley Ordinance No. 26, 1982, to the Defendant would violate Article II, Section 11 of the Colorado Constitution as well as the prohibition of ex post facto laws in the Colorado and United States Constitutions. ¶ 72, Vol. 1, p. 92.

4. The City of Greeley exceeded its authority and power under the Colorado Constitution and statutes when it

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[1] On the first day of trail the Trial Court reserved ruling on the issues raised by Poudre Valley's Motion to Dismiss the City's Amended Complaint, Vol. 5, p. 19, line 16. On the sixth day of trial, the Trial Court permitted Poudre's previous Answer as well as the issues raised in Poudre's Motion with respect to the Amended Complaint (Vol. 3, pp. 863-873 and 881-916) to be deemed to constitute Poudre's Answer to the Amended Complaint. (We have not repeated here the defenses in the original answers which are also included in the foregoing memoranda supporting the Motion to Dismiss the Amended Complaint.) The unresolved defenses to Home Light's Complaint in Intervention do not materially differ from those made to the City's Complaint.

purported to hold the July 13, 1982 election alleged in the Complaint. ¶ 73, Vol. 1, p. 93.

5. City of Greeley Ordinance No. 26, 1982, and the relief sought in this lawsuit unconstitutionally impairs Defendant's contract with the State evidenced by its State franchise in violation of the Colorado and United States Constitutions. ¶ 74, Vol. 1, p. 93.

6. City of Greeley Ordinance No. 26, 1982 and the relief sought in this lawsuit unconstitutionally impairs Defendant's contracts with its lenders, its contracts with its members, its contracts with landowners, its contracts with those from whom it purchases electricity, and its March 18, 1970 contract with Home Light dividing service territory. ¶ 75, Vol. 1, p. 93.

7. Granting the relief requested in the Complaint will constitute an unlawful taking of Defendant's property without just compensation in violation of the Colorado and United States Constitutions. ¶ 80, Vol. 1, p. 94.

8. Granting the relief requested in the Complaint will constitute de facto condemnation of Defendant's property without complying with the requirements of Colorado law, including the requirements of § 31-15-107, C.R.S. 1973. ¶ 81, Vol. 1, p. 94.

9. City of Greeley Ordinance No. 26, 1982, unconstitutionally provides for an unlawful taking of Defendant's property in violation of the Colorado and United States Constitutions. ¶ 82, Vol. 1, pp. 94-95.

10. Defendant's electrical distribution system was acquired and constructed with the aid of loans made by the United States, through the Rural Electrification Administration (the "REA"), and under these loans Defendant could not comply with any order granting the relief required in the

Complaint without the approval of the REA. The United States of America is therefore an indispensable party because it is not subject to service of process, a judgment entered in its absence will be prejudicial both to the United States and to the Defendant, prejudice cannot be avoided by any protective measure, a judgment entered without it will not be adequate, and Plaintiff had an adequate remedy by an appeal from the PUC's decision attached hereto as Exhibit B but chose not to avail itself of that remedy. Accordingly, the case should be dismissed pursuant to Rule 19(b). ¶ 84, Vol. 1, p. 95.

11. Defendant's electrical distribution system was constructed with the aid of loans made by the United States through the REA and granting the relief requested in the Complaint without the approval of the REA would violate the supremacy clause of the United States Constitution. ¶ 85, Vol. 1, pp. 95-96.

12. The Colorado Supreme Court's adjudication of the foregoing defenses against Poudre (in addition to contravening the foregoing constitutional provisions) violates the due process and equal protection clauses of the United States and Colorado Constitutions.

13. The Amendment of Article XX in 1986 during the pendency of this appeal gives rise to additional defenses because the Greeley Charter requires the vote of "qualified tax paying electors" to grant city franchises, but Article XX (as amended) permits charter provisions which require the vote of "registered electors."

APPENDIX J

SUPREME COURT, STATE OF COLORADO
Case No. 85-SA-293

PETITION FOR REHEARING

THE CITY OF GREELEY, COLORADO, a municipal corporation, and HOME LIGHT and POWER COMPANY, a Colorado corporation,

Appellants,

v.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Appellee.

APPEAL FROM THE DISTRICT COURT, WELD COUNTY HONORABLE JUDGE ROBERT BEHRMAN

OPINION BY JUSTICE ERICKSON

EN BANC

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED

Gerald E. Dahl
1500 Grant Street
Denver, Colorado 80203
303/831-6411

ATTORNEYS FOR THE COLORADO MUNICIPAL LEAGUE

Dudley P. Spiller, Jr.
Paula M. Connelly
Joseph B. Wilson
1401-17th Street,
Suite 1100
P.O. Box 17180 TA
Denver, Colorado 80217
303/534-1200

ATTORNEYS FOR THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES

The Colorado Municipal League ("CML") and the Colorado Association of Municipal Utilities ("CAMU"), pursuant to C.A.R. 40, petition this Court for a modification of its decision in the captioned action. As grounds therefor, Petitioners state as follows:

1. CML and CAMU were *amicus* parties and have actively participated in this matter during both the District Court and Supreme Court proceedings. Petitioners are membership organizations formed to promote and protect the interests of member municipalities and municipal utilities, respectively.

2. Upon review of the captioned decision, Petitioners believe that the Court has included, as *dictum*, certain language, which appears on the bottom of page 17 and the top of page 18, which may be misconstrued in a manner that could eliminate the ability of municipalities to renegotiate franchise agreements upon their expiration. While Petitioners do not read the language to cause this result, this language could be read to negate certain clear constitutional and statutory provisions that preserve for local governments and their citizens the right to grant and renew franchises. The language is unnecessary and can be modified without altering the holding of the Court.

3. There are 267 municipal corporations within the State of Colorado. With few exceptions, each of these municipalities has a franchise with one or more public utilities providing either electric, gas, sewer or water service within the municipal corporate limits. This Court, by virtue of *Community Telecommunications, Inc. v. Heather Corp.*, 677 P.2d 330 (Colo. 1984), has also required municipalities to enter into franchise arrangements with cable television providers.

4. The authority of municipalities to grant franchises to public utilities is well-established and, as clarified by the captioned decision, is a necessary complement to the certifi-

cation authority of the Public Utilities Commission. As the Court held at page 15 of its decision:

> The constitutional and statutory provisions demonstrate that municipal and PUC consent are necessary to operate a public utility within a home rule city; neither the General Assembly nor its designated agency, the PUC, is empowered to grant a public utility a franchise to use a home rule city's streets, alleys, and public places in the absence of the municipality's consent.

5. McQuillin characterizes municipal franchises as "the concrete, definite points of contact between large public and large private interests." 12 McQuillin, *Municipal Corporations*, § 4.01. The franchise agreement constitutes the primary manner by which municipalities regulate the use of public streets and rights-of-way by utility providers. The franchise authority is an exercise of the sovereign power, constitutionally conferred upon local governments so that they may maintain exclusive domain over the streets within their boundaries. Colo. Const. art. XX, §§ 4, 6; art. XXV; C.R.S. §§ 31-15-702, 31-15-707. The language with which Petitioners are concerned could be misconstrued to render these provisions a nullity regarding renewal of municipal franchises.

6. A franchise agreement constitutes a contract between the municipality and the serving utility which defines the rights and obligations of each of these entities. *Public Util. Comm'n v. City of Durango*, 171 Colo. 553, 469 P.2d 131 (1970); 12 McQuillin, *supra*, § 34.06. In addition to determining which entity has the right to operate within a municipality, the franchise contract also addresses a multiplicity of issues regarding the conditions of use of public rights-of-way, municipal aesthetics, public safety concerns and municipal revenues. Through the franchise contract, the municipality and the serving utility are able to structure the conditions of

the provision of public utility service in order to maximize public benefit. For example, through the franchise many municipalities require the undergrounding of new and selected existing utility facilities, thus improving public safety, as well as the aesthetic environment of the municipality. Through renewal, franchise terms are continually updated to address timely issues involving the interface between the community and the utility.

7. As a contract of specific duration, franchises naturally terminate and are subject to renegotiation. 12 McQuillin, *supra*, §§ 34.50-34.52. The cycle of expiration and renewal is clearly contemplated by the Colorado Constitution and statutes. *See* Colo. Const. art. II, § 11 (prohibiting the grant of perpetual rights); C.R.S. § 31-15-707. In fact, C.R.S. § 31-15-707(1)(a)(II) specifically discusses franchise renewal and § 31-15-707(1)(c) limits the term of various municipal franchises to 25 years.

8. Petitioners neither dispute nor seek to alter the holding reached by the Court in this case. While Petitioners do not read the Court's opinion in this manner, the decision as issued contains certain language which could be misinterpreted to excuse public utilities from the duty of renegotiating or renewing franchises upon expiration. Specifically, language contained on pages 17 and 18 of the decision could possibly be read to imply that once an electric utility obtains its initial municipal franchise it need not seek renewal of such franchise upon its expiration or termination.

9. The fact situation of a franchise renewal was not presented to the Court during this case nor was the law on franchise renewal briefed. At issue was whether REA was required to obtain a municipal franchise. Petitioners do not read this decision in a manner which addresses franchise renewal; nevertheless, it is conceivable that public utilities

and other franchise recipients may argue that the language contained on pages 17 and 18 excuses them from the obligation of franchise renegotiation or renewal. Such a reading could effectively freeze the terms and conditions of the franchise, or conceivably negate all such terms, upon the expiration of the franchise. Under such circumstances, municipalities and their citizens would be denied their constitutionally protected power to contractually establish, through the franchise, the terms and conditions governing the use of public streets.

10. In order to clarify this decision in a manner which will not alter its holding, Petitioners seek the modification of certain language unnecessary to the Court's holding. Specifically, Petitioners seek the deletion of the final paragraph commencing on page 17 and ending on page 18, and the first two sentences of the first full paragraph on page 18, as well as the addition of the following sentence at the end of the first full paragraph on page 18: "Further, our decision in this case does not extend to the issue of franchise renewal." Clarification as requested may obviate needless litigation over this issue in the future.

WHEREFORE, Petitioners seek a modification of the captioned decision in accordance with the views expressed herein.

Dated this 22nd day of September, 1987.

GORSUCH, KIRGIS,
CAMPBELL, WALKER
AND GROVER

By: /s/ Gerald E. Dahl
Gerald E. Dahl, #7766
1500 Grant Street
Denver, Colorado 80203
303/831-6411

ATTORNEYS FOR
THE COLORADO
MUNICIPAL LEAGUE

By: /s/ Joseph B. Wilson
Dudley P. Spiller, Jr., #7908
Paula M. Connelly, #14451
Joseph B. Wilson, #15306
1401-17th Street,
Suite 1100
P.O. Box 17180 TA
Denver, Colorado 80217
303/534-1200

ATTORNEYS FOR
THE COLORADO
ASSOCIATION OF
MUNICIPAL UTILITIES

APPENDIX K

SUPREME COURT, STATE OF COLORADO
Case No. 85-SA-293

APPELLEE'S MOTION TO STAY OR RECALL ISSUANCE OF MANDATE BASED ON THE AGREEMENT BETWEEN POUDRE AND THE CITY OF GREELEY AND C.A.R. 41.1

THE CITY OF GREELEY, COLORADO, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation, *Plaintiffs-Appellants,* v. POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation, *Defendant-Appellee.*	Appeal Directly to the Colorado Supreme Court Pursuant to § 13-4-102(1)(b), 6 C.R.S. (1973) from the DISTRICT COURT, WELD COUNTY, No. 82-CV-617 The Honorable Robert A. Behrman

Pursuant to C.A.R. 41.1, and based on the attached agreement between Appellee Poudre Valley Rural Electric Association, Inc. ("Poudre") and the City of Greeley, Poudre respectfully moves this Court to stay issuance of the Mandate herein or, if the Mandate has been issued, to recall and stay the Mandate herein. As grounds for this Motion, Poudre states the following:

1. This Motion should not be in dispute because Greeley has stipulated to it in the agreement attached hereto. Greeley's agreement recognizes that it is not in either Greeley's or Poudre's interest to commence enforcement of City of Greeley Ordinance 26, 1982 until Poudre has exhausted its judicial

remedies. As shown below, Poudre intends to appeal this Court's September 8, 1987 judgment to the United States Supreme Court.

2. The Court rendered its en banc opinion on September 8, 1987.

3. On October 7, 1987, counsel for Poudre received the Court's October 5, 1987 Order denying Poudre's Petition for Rehearing. Accordingly, unless stayed, the Mandate will issue, pursuant to C.A.R. 41, on October 7, 1987, two days after the Court's denial of Poudre's Motion for Rehearing.

4. C.A.R. 41.1 provides that: "In cases in which review by the Supreme Court of the United States may be sought, . . . the Supreme Court of Colorado, or a justice thereof, may stay or recall the mandate, as may be appropriate."

5. As set forth in greater detail in Poudre's Petition for Rehearing, filed in this Court on September 22, 1987, which is incorporated by reference herein, Poudre raised defenses to the Complaint in this action which called into question the validity of City of Greeley Ordinance 26, 1982, Article XVIII of the Greeley Charter, and Articles XX and XXV of the Colorado Constitution on the grounds that they were repugnant to the Constitution and Laws of the United States. By virtue of its denial of Poudre's Petition for Rehearing, this Court has upheld the validity of City of Greeley Ordinance 26, 1982, Article XVIII of the City of Greeley Charter, Articles XX and XXV of the Colorado Constitution, as well as the validity of this Court's action in resolving Poudre's affirmative defenses against it on appeal without due process of law even though the District Court did not reach those defenses and there was substantial evidence to support them.

6. Under 28 U.S.C. § 1257(2) Poudre is entitled to seek review of these rulings by appeal to the United States Su-

preme Court.[1] Under 28 U.S.C. § 2101(c) and Rules 11 and 12 of the Rules of the United States Supreme Court, Poudre has ninety (90) days from the date its Petition for Rehearing was denied (or until January 4, 1988) in which to file its Notice of Appeal and jurisdictional statement in the United States Supreme Court.

7. On July 19, 1983, Poudre and the City of Greeley agreed (in the document attached hereto) that Ordinance No. 26, 1982 and Article XVIII of the Greeley City Charter would not be enforced as to Poudre "during the course of" this litigation "until final judgment and exhaustion of appeals" and that Poudre "shall continue" to serve and extend service within the City of Greeley "until final judgment and exhaustion of appeals." This agreement alone justifies staying the mandate.

8. Even in the absence of the attached agreement between Poudre and the City of Greeley, Poudre would be entitled to a stay of the mandate. While C.A.R. 41.1 has not been construed, the United States Supreme Court Justices applying analogous Supreme Court Rule 44.1 have developed three factors to be considered in determining whether to grant an application for a stay pending appeal:

> Three considerations govern a Justice's decision whether to grant an application for a stay pending

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[1] Poudre believes this case raises issues which can be appealed as of right pursuant to 28 U.S.C. § 1257(2) However, if the Supreme Court determines that "an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a state . . . , in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal, but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court is the time the appeal was taken." 28 U.S.C. § 2103.

> appeal. First, there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious to justify notation of probable jurisdiction.
>
> Second, there must be a significant possibility of reversal of the lower court's decision. Finally, there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed.
>
> *Ledbetter v. Baldwin*, 107 S.Ct. 635, 636 (1986). (Powell, J.)[2]

THERE IS A REASONABLE PROBABILITY THAT FOUR MEMBERS OF THE UNITED STATES SUPREME COURT WOULD CONSIDER THE UNDERLYING ISSUES SUFFICIENTLY MERITORIOUS TO JUSTIFY NOTATION OF PROBABLE JURISDICTION

This Court's September 8, 1987 Opinion (the "Opinion") overlooks *substantial* unresolved defenses (listed in the Appendix to Poudre's September 22, 1986 Petition for Rehearing) which could not be presented on appeal because the District Court concluded that the City of Greeley ("Greeley") lacked power to require a city franchise because Poudre had a franchise from the State and therefore did not reach all of Poudre's defenses. Greeley has conceded these defenses must be resolved before the relief it seeks can be granted. *See* pp. 16-17 of Greeley's "Answer Brief to Defendant's Memorandum . . ." Vol. 3[3], pp. 722-23 and Greeley's Trial Data Certificate, Vol. 2, p. 654.

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[2] Where only Supreme Court citations are used in this Motion, the decision is not reported in the U.S. Reporter.

[3] Record references are to the volume and page number, *e.g.*, Vol. __ , p. ____. Trial Exhibits are referred to herein as Exhibits.

Two examples show that the issues for appeal are sufficiently meritorious to justify notation of probable jurisdiction by the United States Supreme Court.

A. *The Impairment of Contract Defense.*[4] In *Russell v. Sebastian*, 233 U.S. 195 (1914), the United States Supreme Court held the contract between the utility and the State, created by the utility laying lines and preparing to serve a geographic area, permitted the utility to not only continue to maintain its existing facilities, but to expand them.

> [W]e find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service .... In this view, *the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city*. (Citations omitted. Emphasis added.) 233 U.S. at 208.

In this case, the evidence was uncontroverted that, before Greeley commenced annexing Poudre's territory in 1981, Poudre had constructed 2,400 miles of lines including lines running through Greeley.[5] Construction of Poudre's system began pursuant to a 1940 permit from Weld County (*see* Exhibit 103), 18 years before Greeley became a home rule city in 1958 (*see* Exhibit 96), and 42 years before Greeley enacted franchise Ordinance 26, 1982 (Exhibit G).

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[4] U.S. Const. Art. I, § 10 and Colo. Const. Art. II, § 11.

[5] *See, e.g.*, Vol. 6, p. 156, lines 10-12 and lines 18-25; Vol. 8, p. 112, line 23 through p. 113, line 5; Vol. 8, p. 147, line 6 through p. 151, line 18; Vol. 10, p. 38, line 6 through p. 41, line 14.

These undisputed facts with respect to Poudre's acceptance of the State's offer in § 38-5-101, C.R.S. ("§ 38-5-101") to "construct, maintain and operate" its electrical distribution system on the streets of the State of Colorado show that the Opinion and the Order denying the Petition for Rehearing ignore *Russell v. Sebastian, supra.*

Because Poudre accepted the offer from the State found in § 38-5-101 (at a time when § 38-5-108, C.R.S. ["§ 38-5-108"] had been held to mean that a city expressed its consent through the reasonable exercise of its police power)[6], City of Greeley Ordinance 26, 1982, Article XVIII of the Greeley Charter and Articles XX and XXV of the Colorado Constitution are repugnant to the Constitution and laws of the United States.

B. *The Supremacy Clause Defense.* It is undisputed that all of Poudre's assets including those in areas annexed by Greeley have been mortgaged to the Rural Electrification Administration (the "R.E.A.").[7] Moreover, the Trial Court found that granting the relief requested by Greeley *"would prevent adequate service to rural territory in the vicinity of expanding cities."*(Emphasis added). ¶ 35 at Vol. 3, p. 1029. Consequently, granting the relief requested by Greeley violates the Supremacy Clause contained in Article VI of the United States Constitution. *See P.U.D. No. 1 v. United States,* 417 F.2d 200, 201 (9th Cir. 1969).

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[6] *City of Englewood v. Mountain States Telephone and Telegraph Co.,* 163 Colo. 400, 431 P.2d 40 (1967).

[7] *See* Poudre's Trial Exhibit 88 and the testimony of Poudre's General Manager, Ronald J. Carey, at Vol. 8, p. 113, line 18 through p. 114, line 17. All exhibits were admitted by stipulation, Vol. 5, p. 47, lines 15-22.

C. Poudre is entitled, as a matter of due process, to an adjudication on these and other unresolved defenses. The Opinion and the Order denying Poudre's Petition for Rehearing have ruled against Poudre on these defenses even though they were not before the Court and in so doing has violated Poudre's due process rights under the United States Constitution.

THERE IS A SIGNIFICANT POSSIBILITY OF REVERSAL OF THIS COURT'S SEPTEMBER 8, 1987 DECISION

For the reasons just discussed, Poudre submits that there is a significant possibility of reversal of this Court's September 8, 1987 decision.

IRREPARABLE HARM WILL RESULT IF THIS COURT'S MANDATE IS NOT STAYED AND GREELEY DOES NOT COMPLY WITH THE ATTACHED AGREEMENT

In paragraph 35 of its findings of fact, the Trial Court determined that granting the relief requested by the City "would prevent adequate service to rural territory in the vicinity of expanding cities."

> 35. To allow the expulsion of a electric utility from portions of its certificated territory by virtue of annexation of that territory by a municipality which franchises another utility would create serious problems. It would handicap the certificated electric utility in providing suitable service to its territory because long term planning would be difficult or impossible. Large scale investment in plant and equipment could not be justified if the utility were subject to expulsion at the whim of adjoin-

> ing cities. These and other similar considerations would prevent adequate service to rural territory in the vicinity of expanding cities.

The validity of this finding was not raised on appeal. Preventing adequate service to rural territory in the vicinity of expanding cities constitutes irreparable injury to Poudre's members because it cannot be adequately compensated through an award of damages. *Cf. Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 357-58 (10th Cir. 1986) in which the Tenth Circuit reversed the District Court's Order dissolving an injunction enjoining the sale of an REA financed distribution cooperative's assets to another utility which it was contended would breach a requirements contract between the REA financed distribution cooperative and Tri-State, a generation and transmission cooperative of which the distribution cooperative was a member because, among other things,

> ... the broader public interest also dictates that an injunction should issue. Both Tri-State and the United States claim that the viability of the REA program depends on the outcome of the merits in this case. Furthermore, if the injunction does not issue, they maintain, the federal government's program is immediately threatened, harming not only the customers of Tri-State and customers of its member distribution cooperatives but also the customers of electrical cooperatives across the nation. It would be difficult, if not impossible, to compensate that pervasive injury through damages.

See also Organized Village of Kake v. Egan, 80 S.Ct. 33, 38 (1959) (Brennan, J.) (Restraining order issued pending appeal based upon allegations that the State of Alaska would enforce a state statute to prevent trap fishing authorized by

the United States Secretary of the Interior, resulting in substantial financial loss for fishing and canning operations, and in turn causing irreparable injury to the economy and welfare of the Indian communities.).

Moreover, deprivation of constitutional rights justifies the granting of the stay of mandate. *See, e.g., Jaffree v. Board of School Commissioners*, 459 U.S. 1314 (1983) (Powell, J.) and *Pacileo v. Walker*, 446 U.S. 1307 (1980) (Rehnquist, J.). If Greeley does not comply with the attached agreement, not only will Poudre be deprived of its property rights in its franchise from the State without due process of law, but Poudre's contract with the State created when it accepted the State's offer in § 38-5-101, C.R.S. will be impaired.

In addition, even if the September 8, 1987 decision is reversed by the United States Supreme Court, if Greeley does not comply with the attached agreement, it is unlikely that Poudre Valley will be able to recover the lost revenues for any services it is not permitted to serve without obtaining a city franchise during the pendency of an appeal.

Moreover, if Greeley does not comply with the attached agreement, Poudre may have to incur the expense of an election as well as the expenses of defending proceedings before the Colorado Public Utilities Commission ("PUC") if Poudre does not win the franchise election. Neither the election expenses nor the expense of the PUC proceeding would be recoverable if Poudre pervails on the appeal.

Finally, neither the City of Greeley (which has agreed not to enforce its Ordinance until Poudre has exhausted all judicial remedies) nor Home Light & Power Company (which has not made any investment to serve the portion of

Poudre's territory which has been or is projected to be annexed to Greeley[8]) will be harmed if the stay is granted.

WHEREFORE, Poudre respectfully requests that this Court enter an order staying issuance of the Mandate herein for a period of ninety (90) days, to and including January 4, 1988 to permit Poudre to file its Notice of Appeal and jurisdictional statement with the United States Supreme Court, or, if the Mandate has in fact been issued, directing that the Mandate be recalled and stayed. Poudre requests further that the Court's Order staying the Mandate provide that, if Poudre's appeal is filed within such ninety (90) day period, issuance of the Mandate will be stayed pending ultimate determination by the United States Supreme Court of the issues raised by Poudre's appeal.

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[8] Michael Geile, Home Light's President, testified that no building had been done by Home Light to serve the areas projected to be annexed to Greeley. Vol. 8, page 58, lines 15-19. The undisputed testimony showed that after 1978, Poudre had incurred out of pocket expenses of $196,361.66 as part of its plan to serve the area in controversy, and that the replacement cost of Poudre's facilities in the area proposed to be annexed to Greeley was $1,325,157.07. Vol. 8, p. 147, lines 6-24 and Vol. 9, p. 23, line 19 through p. 24, line 15.

DATED: October 7, 1987.

HOLMES & STARR
A Professional Corporation
Kenneth L. Starr (246)
Ann Livedalen (7232)

RANDOLPH W. STARR, P.C.
Randolph W. Starr (3183)
221 East 29th St., #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

By /s/ Kenneth L. Starr
717 Seventeenth Street, #2440
Denver, CO 80202
(303) 292-1500

APPENDIX L

Exhibit A

AGREEMENT FOR PROVISION OF SERVICE

WHEREAS, Poudre Valley Rural Electric Association, Inc., (Poudre Valley) has poles, wires and other electric transmission and distribution facilities located within the City of Greeley; and

WHEREAS, Poudre Valley has received a certificate of Public Convenience and Necessity from the Public Utilities Commission for an area within the corporate limits of the City of Greeley; and

WHEREAS, Poudre Valley has not obtained a franchise from the City of Greeley to operate at any point within its corporate limits; and

WHEREAS, the City of Greeley has initiated litigation to determine whether or not Poudre Valley must obtain a franchise to operate within the City of Greeley.

NOW, THEREFORE, the City of Greeley and Poudre Valley agree as follows:

1. During the course of litigation in the case entitled *City of Greeley v. Poudre Valley Rural Electric Association, Inc.*, 82CV617, Weld County District Court, until final judgment and exhaustion of appeals, Poudre Valley shall continue to serve within the City of Greeley.

2. Such service shall include extension to any new services when required and requested by property owners, according to its extension policies, bylaws, rules, regulations, tariffs, and other governing instruments in effect from time to time.

3. The City of Greeley will not enforce any provision of Article XVIII of the Greeley City Charter or of Ordinance No. 26, 1982, as it affects Poudre Valley's business within the corporate limits of the City of Greeley as against Poudre Valley, its agents or employees. In the event enforcement of all or any portion of said provisions is allowed by a court of competent jurisdiction subsequent to completion of all appeals, then enforcement shall prospectively commence from and after the date of final judgment and exhaustion of appeals as if the effective date of the ordinance were such date of final judgment and exhaustion of appeals.

4. Neither the provision of service by Poudre Valley, nor the failure to enforce said provisions of the Charter and Ordinances by the City shall be construed to be a complete or partial waiver of any claim or defense of either Poudre Valley or the City of Greeley in the litigation referred to in paragraph 1 of the Agreement.

AGREED TO THIS 19th DAY OF JULY, 1983.

[SEAL]

THE CITY OF GREELEY, COLORADO

/s/ Mike Lehan
Mayor

ATTEST: /s/ Gayle Voss
City Clerk

POUDRE VALLEY RURAL
ELECTRIC ASSOCIATION, INC.

/s/ John I. Boxberger
President

APPENDIX M

SUPREME COURT, STATE OF COLORADO
CASE NO. 85SA293
APPEAL FROM THE DISTRICT COURT,
WELD COUNTY, #82CV617

ORDER OF COURT

THE CITY OF GREELEY, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Plaintiffs-Appellants,

vs.

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,

Defendant-Appellee.

Upon consideration of the Appellee's Motion to Stay or Recall Issuance of Mandate Based on the Agreement Between Poudre and The City of Greeley and C.A.R. 41.1 filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion shall be, and the same hereby is, GRANTED and ISSUANCE OF THE MANDATE STAYED FOR THIRTY (30) DAYS. ANY FURTHER STAYS MUST BE REQUESTED FROM THE U.S. SUPREME COURT.

BY THE COURT, OCTOBER 8, 1987.

cc: Edward "Jed" M. Caswall
Donald D. Cawelti
James K. Tarpey
Kenneth L. Starr
Ann Livedalen
John J. Conway
Gerald E. Dahl
Tami A. Tonoue
Paula M. Connelly
Joseph B. Wilson
Randolph W. Starr

Supreme Court
State of Colorado

Certified to be a full,
true and correct copy

OCT 9 1987

MAC V. DANFORD
Clerk of the Supreme Court
By /s/ Delsa B. Denlow
Deputy Clerk

APPENDIX N

RULE 40(a) OF THE COLORADO RULES OF APPELLATE PROCEDURE

(a) Time for Filing; Content; Answer, Action by Court if Granted. A petition for rehearing may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

APPENDIX O

TITLE 7, SECTION 901 OF THE UNITED STATES CODE

§ 901. *Rural Electrification Administration; Administrator; short title*

There is created and established in the Department of Agriculture an agency of the United States to be known as the "Rural Electrification Administration", all of the powers of which shall be exercised by an Administrator, under the general direction and supervision of the Secretary of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of ten years. This chapter may be cited as the "Rural Electrification Act of 1936."

TITLE 7, SECTION 907 OF THE UNITED STATES CODE

§ 907. *Acquisition of property pledged for loans; disposition; sale of pledged property by borrower*

The Administrator is authorized and empowered to bid for and purchase at any foreclosure or other sale, or otherwise to acquire, property pledged or mortgaged to secure any loan made pursuant to this chapter; to pay the purchase price and any costs and expenses incurred in connection therewith from the sums authorized in section 903 of this title; to accept title to any property so purchased or acquired in the name of the United States of America; to operate or lease such property for such period as may be deemed necessary or advisable to protect the investment therein, but not to exceed five years after the acquisition thereof; and to sell such property so purchased or acquired, upon such terms and for such consideration as the Administrator shall determine to be reasonable.

No borrower of funds under sections 904 or 922 of this title shall, without the approval of the Administrator, sell or dispose of its property, rights, or franchises, acquired under the provisions of this chapter, until any loan obtained from the Rural Electrification Administration, including all interest and charges, shall have been repaid.

APPENDIX P

TITLE 28, SECTION 1257 OF THE UNITED STATES CODE

§ 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX Q

TITLE 28, SECTION 2101 OF THE UNITED STATES CODE

§ 2101. *Supreme Court; time for appeal or certiorari; docketing; stay*

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title [28 USCS §§ 1252, 1253, 2282], holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

APPENDIX R

TITLE 28, SECTION 2103 OF THE UNITED STATES CODE

§ 2103. *Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari*

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

APPENDIX S

TITLE 28, SECTION 2403(b) OF THE UNITED STATES CODE

§ 2403. *Intervention by United States or a State; constitutional question*

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

APPENDIX T

RULE 201 OF THE COLORADO RULES OF EVIDENCE

Rule 201. *Judicial Notice of Adjudicative Facts*

(a) *Scope of rule.* This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.* A court may take judicial notice, whether requested or not.

(d) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

APPENDIX U

SECTION 2-5-113 OF THE COLORADO REVISED STATUTES

provides in relevant part:

2-5-113. *Enactment of Colorado Revised Statutes 1973-effect.* (1) The Colorado Revised Statutes 1973 shall be enacted as a repeal and reenactment of the Colorado Revised Statutes 1963 and the supplements thereto.

(2) The effect of the enactment of the Colorado Revised Statutes 1973, as of its effective and operative date, shall be:

(a) To repeal all statutes and parts of statutes of a general and permanent nature not contained in the Colorado Revised Statutes 1973;

(b) To revive no law repealed or superseded before the effective and operative date of the Colorado Revised Statutes 1973;

(c) To affect no act done, right accrued, or obligation incurred or imposed by law prior to that effective and operative date;

(d) Neither to abate nor otherwise affect any action, suit, or proceeding pending on such effective and operative date;

(e) To affect no penalty or forfeiture incurred before such effective and operative date, except that where a punishment, penalty, or forfeiture is mitigated by any provision of the Colorado Revised Statutes 1973, that

mitigating provision shall apply to any judgment pronounced after that effective and operative date; and

(f) To have no effect on the running or ending of a limitation or period of time prescribed for acquiring a right, barring a remedy, or for any other purpose, where the time limitation began to run before that effective and operative date and the same or a similar limitation is prescribed in Colorado Revised Statutes 1973.

(3) The provisions of Colorado Revised Statutes 1973, insofar as they are the same in substantial intent, effect, and meaning as those of prior laws, shall be given effect as though a continuation of those laws and not as new enactments. If, however, any act set out in the prior laws and reenacted by Colorado Revised Statutes 1973 or any supplement thereto is alleged to have had a defective title when originally enacted, that defect is cured by enactment of the Colorado Revised Statutes 1973 or any supplement thereto.

• • •

In 1983, § 2-5-113(1) of the Colorado Revised Statutes was amended to read as follows:

2-5-113. *Effect of enactment of Colorado Revised Statutes 1973 — legislative construction not based on editorial matters.* (1) Colorado Revised Statutes 1973 was enacted as a repeal and reenactment of Colorado Revised Statutes 1963 and the supplements thereto, as provided for in section 2-5-122.

APPENDIX V

SECTION 31-2-217 OF THE COLORADO REVISED STATUTES

31-2-217. *Vested rights saved.* The adoption of any charter, charter amendment, or repeal thereof shall not be construed to destroy any property right, contract right, or right of action of any nature or kind, civil or criminal, vested in or against the municipality under and by virtue of any provision of law theretofore existing or otherwise accruing to the municipality; but all such rights shall vest in and inure to the municipality or to any persons asserting any such claims against the municipality as fully and as completely as though the charter, amendment, or repeal thereof had not been adopted. Such adoption shall never be construed to affect any such right existing between the municipality and any person.

APPENDIX W

SECTION 38-5-101 OF THE COLORADO REVISED STATUTES

38-5-101. Use of public highways. Any domestic or foreign telegraph, telephone, electric light power, gas, or pipeline company authorized to do business under the laws of this state or any city or town owning electric power producing or distribution facilities shall have the right to construct, maintain, and operate lines of telegraph, telephone, electric light, wire or power or pipeline along, across, upon, and under any public highway in this state, subject to the provisions of this article. Such lines of telegraph, telephone, electric light, wire or power or pipeline shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway.

SECTION 38-5-108 OF THE COLORADO REVISED STATUTES

38-5-108. Consent necessary to use of streets. Nothing in this article shall be construed to authorize any person, partnership, association, corporation, or city or town to erect any poles, construct any telegraph, telephone, electric light power line, or pipeline, or extend any wires or lines along, through, in, upon, under, or over any streets or alleys of any city or incorporated town without first obtaining the consent of the municipal authorities having power to give the consent of such city or incorporated town.

APPENDIX X

SECTION 40-5-101 OF THE COLORADO REVISED STATUTES

40-5-101. *New construction — extension.* (1) No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 40-5-101 to 40-5-104 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it has theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, line, plant, or system and not theretofore served by a public utility providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system interferes or is about to interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions or prescribing such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

(2) Whenever the commission, after a hearing upon its own motion or upon complaint, finds that there is or will be a duplication of service by public utilities in any area, the commission shall, in its discretion, issue a certificate of public convenience and necessity assigning specific territories to one or to each of said utilities or by certificate of public

convenience and necessity to otherwise define the conditions of rendering service and constructing extensions within said territories and shall, in its discretion, order the elimination of said duplication upon such terms as are just and reasonable, having due regard to due process of law and to all the rights of the respective parties and to public convenience and necessity.

SECTION 40-5-102 OF THE COLORADO REVISED STATUTES

40-5-102. *Certificate of public convenience and necessity.* No public utility shall exercise any right or privilege under any franchise, permit, ordinance, vote, or other authority granted after April 12, 1913, or under any franchise, permit, ordinance, vote, or other authority granted before April 12, 1913, but not actually exercised before said date or the exercise of which has been suspended for more than one year without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege. When the commission finds, after hearing, that a public utility has, before April 12, 1913, begun actual construction work and is prosecuting such work, in good faith, uninterruptedly, and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise, permit, ordinance, vote, or other authority granted before April 12, 1913, but not actually exercised before said date, such public utility may proceed, under such rules and regulations as the commission may prescribe, to the completion of such work and after such completion, may exercise such right or privilege. Sections 40-5-101 to 40-5-104 shall not be construed to validate any right or privilege invalid on April 12, 1913, or becoming invalid after said date under any law of this state.

SECTION 40-5-103 OF THE COLORADO REVISED STATUTES

40-5-103. *Certificate — application for — issuance.* (1) Before any certificate may issue under sections 40-5-101 to 40-5-104, a certified copy of its articles of incorporation or charter, if the applicant is a corporation, shall be filed in the office of the commission. Every applicant for a certificate to exercise franchise rights under section 40-5-102 shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper county, city and county, or municipal or other public authority. The commission has the power to issue a certificate to exercise franchise rights after hearing, to refuse to issue the same, or to issue it for the partial exercise only of said right or privilege and may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require. Nothing contained in this subsection (1) shall be construed to limit or restrict the power and authority of the commission: To regulate, issue, or refuse to issue certificates of public convenience and necessity for construction of a new facility, plant, or system or of any extension thereof as provided in section 40-5-101; and to attach to the exercise of the rights granted by such certificate such terms and conditions as in the commission's judgment may be required by the public convenience and necessity.

(2) If such public utility desires to exercise a right or privilege under a franchise, permit, ordinance, vote, or other authority which it contemplates securing but which has not yet been granted to it, such public utility may apply to the commission for an order preliminary to the issue of the

certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under such rules and regulations as it may prescribe issue the desired certificate upon such terms and conditions as it may designate after such public utility has obtained the contemplated franchise, permit, ordinance, vote, or other authority. Upon the presentation to the commission of evidence satisfactory to it that such franchise, permit, ordinance, vote, or other authority has been secured by such public utility, the commission shall thereupon issue such certificate.

APPENDIX Y

SECTION 40-6-115 OF THE COLORADO REVISED STATUTES

40-6-115. Review by district court-mandamus. (1) Within thirty days after the application for a rehearing, reargument, or reconsideration is denied by the commission, the applicant may apply to the district court for a writ of certiorari or review for the purpose of having the lawfulness of the final decision inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of issuance and shall direct the commission to certify its record in the proceeding to the court. On the return day, the cause shall be heard by the district court, unless, for a good reason shown, the same be continued. No new or additional evidence may be introduced in the district court, but the cause shall be heard on the record of the commission as certified by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings.

(2) The findings and conclusions of the commission on disputed questions of fact shall be final and shall not be subject to review, except that, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of a petitioner under the constitution of the United States or the constitution of the state of Colorado, the district court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the said constitutional question shall not be final.

(3) Upon review, the district court shall enter judgment either affirming, setting aside, or modifying the decision of the commission. So far as necessary to the decision and where presented, the district court shall decide all relevant questions of law and interpret all relevant constitutional and statutory provisions. The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the decision under review violates any right of the petitioner under the constitution of the United States or of the state of Colorado, and whether the decision of the commission is just and reasonable and whether its conclusions are in accordance with the evidence.

(4) The provisions of the Colorado rules of civil procedure relating to writs of certiorari or review, so far as applicable and not in conflict with the provisions of articles 1 to 13 of this title, shall apply to proceedings had in the district court under the provisions of this section. No court of this state, except the district court to the extent specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties; but an action in the nature of mandamus shall lie from the district court to the commission in all proper cases.

(5) All actions for review shall be commenced and tried in the district court in and for the county in which the petitioner resides, or if a corporation or partnership in the county in which it maintains its principal office or place of business, or in the district court of the city and county of Denver, at the option of the petitioner. Appel-

late review may be obtained in the supreme court concerning any final judgment of the district court on review, affirming, setting aside, or modifying any decision of the commission, in the same manner and with the same effect as appellate review of judgments of the district court in other civil actions.

APPENDIX Z

Poudre's Weld County Permit

KNOW ALL MEN BY THESE PRESENTS, That whereas the Poudre Valley Rural Electric Association has this day duly filed with the Board of County Commissioners of Weld County its application for permission to erect, construct, maintain and operate electric transmission and distribution lines, and system along and upon public highways and public rights-of-ways within the County of Weld, State of Colorado, and it appearing that said association is a duly and regularly incorporated association, organized and existing under and by virtue of the laws of the State of Colorado, relating to corporations, and that said corporation has complied with all of the laws of the State of Colorado, and is now authorized to do business in that state, and that the purposes of said corporation are to erect, maintain and operate electric transmission and distribution lines and systems for the delivery of electric current to persons residing in rural areas in the Counties of Weld, Larimer, and Boulder, State of Colorado, and it further appearing that said corporation desires to erect its poles, wires and transmission and distribution system along, upon and across public roads and highways in Weld County, Colorado, and the Board of County Commissioners of the County of Weld, State of Colorado, having fully considered the said application, and all of the maps, plats and other data submitted to said Board by said corporation or association, and being fully advised in the premises, on motion duly made, seconded, and unanimously adopted at a meeting of the Board of County Commissioners of Weld County, Colorado, on this 2nd day of May, A.D. 1940,

IT IS ORDERED, That permission and authority be and is hereby granted to said Poudre Valley Rural Electric Association to enter upon, and use the Public roads and highways

and public rights-of-way in Weld County, Colorado, for the erection, maintenance and operation of electric transmission and distribution lines, and systems upon, along, and across public roads, highways and rights-of-way, in Weld County, Colorado, upon and along which the said corporation purposes [sic] to locate its said lines and system; that said lines and system shall be built, operated and maintained in accordance with the safety rules promulgated by the United States Bureau of Standards governing the installation and maintenance of electrical supplies and communication lines.

IT IS FURTHER PROVIDED, as a condition to this permit that the erection, maintenance and operation of said transmission lines and system shall be done in such a manner as not to cause undue inconvenience to the public in the use of such roads and highways, and provided that the poles erected shall be set back from the main traveled highway such a distance to conform with the usage and custom in said matter in Weld County, Colorado,

Dated at Greeley, Colorado, this 2nd day of May, A.D. 1940.

THE BOARD OF COUNTY
COMMISSIONERS,
WELD COUNTY,
COLORADO.

/s/ Fred Arens
Chairman

/s/ Fred O. Ford
Member

/s/ A. R. Riggs
Member

Attest:

/s/ Walter F. Morrison
County Clerk and Recorder

/s/ Kathleen E. Day
Deputy County Clerk

APPENDIX AA

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, NATALIE MEYER, Secretary of State of the State of Colorado hereby certify that

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.
(Colorado Corporation)

became incorporated upon the issuance of a Certificate of Incorporation dated October 10, 1939, and said corporation is duly organized, and in good standing, and is authorized and competent to transact its business or conduct its affairs within the State of Colorado.

I DO FURTHER CERTIFY that said corporation has been in good standing from October 10, 1939 to date on certificate.

DATED: December 18, 1987

/s/ Natalie Meyer
Secretary of State

APPENDIX BB

THE CITY OF GREELEY, COLORADO

ORDINANCE NO. 26, 1982

AN ORDINANCE REQUIRING ANY PERSON, FIRM OR CORPORATION PROVIDING ELECTRIC LIGHT SYSTEMS WITHIN THE CITY OF GREELEY TO OBTAIN A FRANCHISE PURSUANT TO ARTICLE XVIII OF THE CHARTER OF THE CITY OF GREELEY.

WHEREAS, Article XVIII of the Charter of the City of Greeley establishes a procedure for granting franchises to public utilities or public utility corporations providing electric light systems; and

WHEREAS, the City Council has determined that it is in the best interest of the citizens of Greeley that persons, firms or corporations providing electric light service within the City of Greeley should obtain a franchise pursuant to Article XVIII of the Greeley City Charter; and

WHEREAS, the City Council determines that this Ordinance is necessary for the protection of the health, safety and welfare of the citizens of Greeley.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GREELEY, COLORADO:

Section 1. Compliance required.

It shall be unlawful to maintain or install any wires, cables or other equipment for the transmission of electric current impulses in, on, under or over any street, alley, sidewalk or other public place in the city, or to maintain or install any pole or mast to support or hold such wires or equipment in any such place, without having fully complied with the provisions of this Ordinance.

Section 2. Franchise required.

After the effective date of this Ordinance, no such wire, cable, pole or other equipment shall be installed or maintained over, on or under any such place unless, pursuant to Article XVIII of the Charter of the City of Greeley, a franchise has been granted for such installation or maintenance. In order to permit the necessary time to obtain a franchise pursuant to Article XVIII of the City Charter, any facilities described in Section 1 which exist on the effective date of this Ordinance may continue to be maintained for a period of one hundred eighty (180) days after the effective date of this Ordinance without the requirement of a franchise.

Section 3. Franchise specifications.

Any franchise granted pursuant to this Ordinance shall comply with all requirements of Article XVIII of the Charter of Greeley and shall specify the fee to be paid for the franchise, the purpose of the facilities to be maintained or constructed under the franchise and the manner in which any such facilities shall be installed or maintained. The franchise shall also specify the location in which any facilities may be installed or maintained and may provide for areas annexed to the city after the date of the franchise.

Section 4. Supervision of work.

It shall be the duty of the Director of Inspections or his designee to supervise all construction or installation work performed subject to any franchise granted under this Ordinance and to make such inspections as may be necessary to ensure compliance with the provisions of the franchise, this Ordinance and other applicable ordinances of the City of Greeley.

Section 5. Option to purchase.

In the event a franchise is not approved or renewed by the electors pursuant to Article XVIII of the Greeley City Charter or at the expiration of a franchise granted under the Charter, whether by termination, revocation or non-renewal, the city shall have the option to purchase the non-complying electric light system within the boundaries of the city and which the city may find necessary or desirable to the proper functioning and operation of an electric light system in the city.

In order to avail itself of this option to purchase, the city shall give written notice to electric light system operator of its desire to exercise its option, which notice shall be valid if given on or before the day the franchise shall so expire or within thirty (30) days after the electors have denied a franchise at an election thereon. On the exercise of this option by the city, the operator shall immediately transfer to the city, possession and title to all facilities and property, real and personal, of the electric light system within the city which the city shall identify in its exercise of the option. Such property shall be free from all liens and encumbrances not agreed to be assumed by the city, unless the city has agreed to a reduction in the purchase price to offset any encumbrances the city may agree to accept.

The operator shall execute such warranty deeds or other instruments of conveyance as shall be necessary for the transfer of its system to the city. Operator shall make it a condition of any contract entered into by it in reference to its operations under the franchise that the contract shall be subject to the exercise of this option by the city, and the city shall have the right to succeed to all privileges and obligations thereunder on the exericse of its option.

The purchse [sic] price for the system of the operator shall be an amount equal to its full fair market value as an operating electric light system.

Failure of the city and operator to agree on the price to be paid for the system shall not delay the performance required herein by operator, that is the requirement to transfer the system to the city immediately following the exercise of the city's option to purchase. In the event, however, the price shall not be agreed upon within sixty (60) days after the option shall have been exercised, then operator shall be entitled to the statutory rate of interest then being paid on judgments within the State of Colorado from the time that the city shall have exercised its option and until the payment is finally made for the system.

In the event that the city and operator fail to agree upon the price to be paid for the system, the parties shall refer the issue of fair market value to a board of qualified appraisers composed of one disinterested person appointed by the city and one disinterested person appointed by operator. If the two appraisers cannot agree on such value, they shall appoint a third disinterested person, and the determination of any two appraisers shall be binding. The expenses relating to the appraisal shall be borne equally by the operator and the city.

Section 6. Violations and penalties.

Any violation of any provision of this Article shall be a violation of the ordinances of the City of Greeley, punishable as provided in Chapter 1.32 of the Code of the City of Greeley. Each day upon which any violation shall continue shall constitute a separate offense, punishable as such.

Section 7. This ordinance shall become effective five (5) days after its final publication, as provided in Section 3-16 and 3-17 of the Greeley Charter.

PASSED AND ADOPTED, SIGNED AND APPROVED THIS 18th DAY OF MAY, 1982,

ATTEST:

/s/ Gayle Voss
City Clerk

THE CITY OF GREELEY, COLORADO

By /s/ Mike Lehan
Mayor

APPROVED:

City Manager

APPROVED AS TO FORM:

/s/ John DiFalco
City Attorney

AFFIDAVIT OF PUBLICATION

STATE OF COLORADO

ss.

County of Weld,

I, Paula A. Barton of said County of Weld, being duly sworn, say that I am an advertising clerk of

THE GREELEY DAILY TRIBUNE, and
THE GREELEY REPUBLICAN

that the same is a daily newspaper of general circulation and printed and published in the City of Greeley, in said county and state; that the notice or advertisement, of which the annexed is a true copy, has been published in said daily newspaper for consecutive (days); that the notice was published in the regular and entire issue of every number of said newspaper during the period and time of publication of said notice, and in the newspaper proper and not in a supplement thereof; that the first publication of said notice was contained in the issue of said newspaper bearing date Twenty-first day of May A.D. 1982; and the last publication thereof; in the issue of said newspaper bearing date the Twenty-first day of May A.D. 1982; that said The Greeley Daily Tribune and The Greeley Republican, has been published continuously and uninterruptedly during the period of at least six months next prior to the first issue thereof contained said notice or advertisement above referred to; that said newspaper has been admitted to the United States mails as second-class matter under the provisions of the Act of March 3, 1879, or any amendments thereof; and that said newspaper is a daily newspaper duly qualified for publishing legal notices and advertisements within the meaning of the laws of the State of Colorado.

May 21, 1982
Total charge: $10.15

/s/ Paula A. Barton
Advertising Clerk

Subscribed and sworn to before me this

21st day of May A.D. 1982

My commission expires February 28, 19

/s/ Carol A. Veatch
Notary Public

NOTICE
THE CITY OF GREELEY,
COLORADO
ORDINANCE NO. 26, 1982

AN ORDINANCE REQUIRING ANY PERSON, FIRM OR CORPORATION PROVIDING ELECTRIC LIGHT SYSTEMS WITHIN THE CITY OF GREELEY TO OBTAIN A FRANCHISE PURSUANT TO ARTICLE XVIII OF THE CHARTER OF THE CITY OF GREELEY.

The foregoing is the title of an ordinance passed and adopted by the City Council of Greeley, Colorado at its regular meeting on the 18th day of May, 1982. Said ordinance was given the No. 26, 1982 and will be effective five (5) days after the publication of this notice.

Said ordinance was published in its entirety on the 7th day of May, 1982 issue of the Greeley Tribune. The City Council directed that second publication be of the title only.

The text of the entire ordinance is available for public inspection and acquisition in the office of the Greeley City Clerk.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the City of Greeley this 18th Day of May, 1982.

Gayle L. Voss, City Clerk

The Greeley Daily Tribune
May 21, 1982

APPENDIX CC

STATE OF COLORADO

DEPARTMENT OF STATE

UNITED STATES OF AMERICA, STATE OF COLORADO. } ss.

CERTIFICATE.

I, NATALIE MEYER, Secretary of State of the State of Colorado, do hereby certify that the proposed charter of the City of Greeley, voted on and adopted at a special election held June 24, 1958 was filed in the office of the Secretary of State in July of 1958 .....

..... IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver, this 21st day of December A.D. 1987

/s/ Natalie Meyer
Secretary of State

/s/ Merilyn Handley
Deputy Secretary of State

APPENDIX DD

ARTICLE XVIII
FRANCHISES AND PUBLIC UTILITIES

Section 18-1. Definition — The term Public Utility or Public Utility Corporation, when used in this Charter, shall mean any person, firm or corporation operating gas or electic light systems, telephone or telegraph system, water or heating plants or transportation systems, closed television circuits, and serving or supplying the public; it shall not include any person, firm or corporation, owning or operating side tracks or switches for the accommodation of manufacturing plants and business houses, or private telephone lines, and shall not include the Board of the Water Department.

Section 18-2. Present Franchises — All franchise ordinances of the City in effect at the time this Charter is adopted shall remain in full force and effect according to their provisions and terms until the expiration dates provided in said franchise ordinances.

Section 18-3. Franchises Granted Upon Vote — No franchise shall be granted except upon the majority vote of the qualified taxpaying electors voting thereon at a special election called for such purpose. The question of its being granted shall be submitted to such vote by ordinance within ninety (90) days after deposit with the Director of Finance of the expense (to be determined by the Director of Finance) of such submission by the applicant for such franchise. The ordinance providing for such election shall be published, following its introduction, weekly for two consecutive weeks in a newspaper of general circulation within the City and after such publication shall be passed on final reading at the first regular meeting of the Council following such publication. An applicant may make application for a new franchise

in accordance with this Article prior to the expiration of its existing franchise.

Section 18-4. Term — Compensation — Restriction — No franchise shall be granted for a longer period than twenty-five (25) years, nor without reserving to the City such fair percentage of the gross receipts arising from the use thereof within the boundaries of the City as shall be fixed in the grant of said franchise. This compensation shall not exempt the grantee or assignees from any lawful taxation upon his or its property, but shall exempt the grantee or assignees from the payment of any licenses, charges or any other impositions levied by the City. The percentage of gross receipts shall be paid annually and a failure to pay such percentage shall work a forfeiture of the franchise.

Section 18-5. Extension of Territory — The Council may extend the area or include streets, alleys, public places and property, not embraced in such franchise, by ordinance, to include future boundaries of the City when the growth of the City and necessity require, subject to all of the terms and conditions of such original franchise and coextensive with the term thereof, without a vote of the electors.

Section 18-6. Elevate or Lower Tracks —

a. The Council shall have power, by ordinance when necessary, to require any railroad company, at its own expense, to elevate, or lower any of its tracks running over, along, or across any street, avenue or alley, and to require any railroad company or companies on some fair apportionment of the cost of expense thereof between it and the City or other public authority in interest, to construct and maintain all street crossings, bridges, or viaducts in good condition with proper approaches and other conveniences heretofore existing upon any street, avenue or alley of the City and over, under and across its or their track or tracks.

b. The Council may, upon fair apportionment of the cost thereof between any person, firm or corporation operating transportation systems and the City or other public authority in interest, require such person, firm or corporation to take measures for the public, as in the opinion of the Council, the public safety or convenience may require.

Section 18-7. Provide for Safety — Every franchise shall be subject to the right of the Council to make all necessary regulations for the safety, welfare and accommodation of the public.

Railroad franchises shall be subject to the right of the Council to construct sewer, water and gas mains and pipes and wire circuits under, over, or through their property.

Section 18-8. Revocable Licenses — The Council shall have power by ordinance to grant a license, revocable for good cause shown, to any railroad company, manufacturer, or merchant, to lay side tracks and switches along or across any street, avenue or alley in the City, when the application therefore is accompanied by the assent in writing of the owners of two-thirds of the frontage on each side of any street, avenue, or alley, or parts thereof, on which it is desired to lay same.

Section 18-9. Revocable Permits — The Council shall have the power to grant a permit for the temporary use or occupation of any street, alley or public place. Such permit shall be revocable at the pleasure of the Council whether the right be expressly reserved in the permit or not.

Section 18-10. Books of Record — The Council shall cause to be kept in the office of the City Clerk an indexed franchise record in which shall be transcribed copies of all public utility franchises heretofore and hereafter granted. The index shall give the name of the grantee and his assignees. The Record shall be a complete history of all such franchises and, shall include a comprehensive and convenient reference to all actions at law affecting the same, and copies of all annual and inspection reports and such other matters of information and public interest as the Council may from time to time require.

APPENDIX EE

ARTICLE XX, SECTION 4, OF THE COLORADO CONSTITUTION

At the time of the July 13, 1982 Greeley franchise election and at the time of the trial in this action, Article XX, Sec. 4, of the Colorado Constitution provided in relevant part that:

> No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise.

From January 15, 1985 to December 17, 1986, Article XX, Sec. 4, of the Colorado Constitution provided in relevant part that:

> No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the registered electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise.

Since December 17, 1986, Article XX, Sec. 4, has provided that:

> Any franchise relating to any street, alley, or public place of the said city and county shall be subject to the initiative and referendum powers reserved to the people under section 1 of article V of this constitution. Such referendum power shall be guaranteed notwithstanding a recital in an ordinance granting such franchise that

such ordinance is necessary for the immediate preservation of the public peace, health, and safety. Not more than five percent of the registered electors of a home rule city shall be required to order such referendum. Nothing in this section shall preclude a home rule charter provision which requires a lesser number of registered electors to order such referendum or which requires a franchise to be voted on by the registered electors. If such a referendum is ordered to be submitted to the registered electors, the grantee of such franchise shall deposit with the treasurer the expense (to be determined by said treasurer) of such submission. The council shall have power to fix the rate of taxation on property each year for city and county purposes.

ARTICLE XX, SECTION 6, OF THE COLORADO CONSTITUTION

provides in relevant part that:

Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

• • •

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and town, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

• • •

APPENDIX FF

ARTICLE XXV OF THE COLORADO CONSTITUTION

Public utilities

In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.

(4)

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1120

In The

Supreme Court of the United States

October Term, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC., a Colorado corporation,

Appellant,

v.

THE CITY OF GREELEY, COLORADO, a municipal corporation, and HOME LIGHT AND POWER COMPANY, a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

DON K. DEFORD, ESQ.
Counsel of Record
109 8th Street, Suite 300
Glenwood Springs, CO 81601
(303) 945-9150
Attorney for Appellee

Of Counsel:
ROBERT J. LOEW
City of Greeley
Law Department
1000 Tenth Street
Greeley, CO 80631
(303) 353-6123

February 26, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

app

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No. 87-1120

In The
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October Term, 1987

POUDRE VALLEY RURAL
ELECTRIC ASSOCIATION, INC.,
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Appellant,

v.

THE CITY OF GREELEY, COLORADO,
a municipal corporation, and
HOME LIGHT AND POWER COMPANY,
a Colorado corporation,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

MOTION TO DISMISS AND SUMMARY OF ARGUMENT

COMES NOW appellee City of Greeley, Colorado, and moves this Court pursuant to Rule 16.1 of the Revised Rules of the Supreme Court of the United States to dis-

miss the above-captioned appeal. As grounds therefore, appellee respectfully submits that the appeal is not within the Court's jurisdiction in that:

1. The decision below from which appellant appeals is not a final decision as required under Section 1257 of Title 28 of the United States Code;

2. The decision below does not present a substantial federal question; and

3. The decision below rests solely on adequate state law grounds.

STATEMENT OF THE CASE

The above-captioned appeal arises from the decision of the Colorado Supreme Court entered on September 8, 1987, which reversed a trial court determination favorable to appellant Poudre Valley Rural Electric Association, Inc. ("Poudre"). In reversing the trial court's judgment, the Colorado Supreme Court ruled that Poudre must obtain a municipal franchise before it could utilize city streets or rights-of-way to expand pre-existing utility services or facilities, or to provide new services within those portions of its service area annexed to the City of Greeley. *See, City of Greeley v. Poudre Valley Rural Electric Association, Inc.*, 744 P.2d 739 (Colo. 1987).

Poudre now claims that in ruling as it did, the Colorado Supreme Court denied Poudre due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. Specifically, Poudre is alleging that

by failing to rule on various affirmative defenses sounding in federal law which were raised, but not decided in the trial court, the Colorado Supreme Court denied Poudre its "day in court" in violation of the Fourteenth Amendment. As noted in its Jurisdictional Statement, a determination on the issues upon which Poudre now seeks review was not necessary at the trial court level. (*See,* Jurisdictional Statement at page 3, para. 2.)

At present, the Colorado Supreme Court has remanded the case back to the trial court for further proceedings consistent with its ruling, where the matter rests awaiting further action.

———o———

ARGUMENT

I. THE DECISION BELOW IS NOT A FINAL DECISION SUBJECT TO REVIEW UNDER SECTION 1257 OF TITLE 28 OF THE UNITED STATES CODE.

Section 1257 of Title 28 of the United States Code grants jurisdiction to the Supreme Court to review "final judgments or decisions rendered by the highest court of a state in which a decision could be had." This finality requirement applies to review of state court judgments brought by way of appeal or by *certiorari. San Diego Gas and Electric Co. v. San Diego,* 450 U.S. 621, 630 n. 10, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981).

It has been generally held that a judgment or decree of the highest court of a state reversing an inferior court and remanding the case to a lower court for further judi-

cial proceedings is not a final judgment and, thus, is not subject to review by the United States Supreme Court. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1914); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). This is so because such further proceedings might remove the basis or alter the nature of the federal appeal. *Minnick v. California Department of Corrections*, 425 U.S. 105, 101 S.Ct. 2211, 68 L.Ed.2d 706 (1981); *Dump Truck Owners v. Public Utilities*, 434 U.S. 9, 98 S.Ct. 251, 54 L.Ed.2d 8 (1977). Appellee respectfully submits that the above-captioned appeal does not involve the prerequisite final judgment or decree as called for in 28 U.S.C. Section 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).[1]

II. THE DECISION BELOW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A state court decision will only be reviewed by the Supreme Court if it affirmatively appears from the record that the federal question upon which review is sought was necessary to the state court determination. *Williams v. Kaiser*, 323 U.S. 471, 477, 65 S.Ct. 363, 89 L.Ed. 398 (1944). If the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate, and independent grounds, review will be denied. *Michigan v. Long*, 463 U.S. 1032, 1041, 102 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The Supreme Court has no authority to review state court determinations of purely state law, nor federal issues that can have no effect on a state court's judgment. *Interna-*

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[1]This matter is set for a hearing on further proceedings before the trial court on March 11, 1988.

tional Longshoremen's Association, AFL-CIO v. Davis, 476 U.S. —, 106 S.Ct. 1904, 90 L.Ed.2d 389, 398 (1986).

The decision by the Colorado Supreme Court in this instance is entirely dependent on interpretations of Colorado state law. The opinion below makes no reference to federal case law, statute, or constitutional interpretation. *Compare, Michigan v. Long, supra.*

III. THE DECISION OF THE COLORADO SUPREME COURT RESTS SOLELY ON ADEQUATE STATE LAW GROUNDS.

Poudre has invoked this Court's appellate jurisdiction under 28 U.S.C. Section 1257(2) upon the argument that in ruling as it did, the Colorado Supreme Court upheld a local ordinance and charter provision in contravention to the Constitution and laws of the United States. A plain reading of the Colorado Supreme Court's decision does not support Poudre's argument. The Colorado Supreme Court's decision is devoid of references to federal constitutional, statutory, or case law, except for a limited illustrative reference to federal judicial interpretations of the franchise power. *See, City of Greeley v. Poudre Valley Rural Electrical Association, Inc., supra,* 744 P.2d at 744. The case below was decided solely upon clearly articulated state law grounds. To the extent appellant feels it was not afforded an adequate opportunity to argue its alleged federal defenses, its remedy is to move the trial court for further proceedings not inconsistent with the Colorado Supreme Court's decision.[2]

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[2]It should be noted that Poudre's original reference to these defenses before the Colorado Supreme Court was contained in a footnote in the concluding paragraph of its Answer Brief.

This Court should exercise its jurisdiction over state court judgments only to the extent they incorrectly adjudge federal rights. *Herb v. Pitcairn*, 324 U.S. 124, 126, 65 S.Ct. 459, 89 L.Ed. 794 (1944). The decision below rendered by the Colorado Supreme Court did not adjudicate any federal rights or issues.

CONCLUSION

The Supreme Court should not exercise jurisdiction in this case in that the decisions entered at both the trial and state court appellate levels did not involve issues, interpretations, or applications of federal law. The ruling below of the Colorado Supreme Court rests solely upon adequate and distinct state law grounds. Finally, in that further proceedings are available in this matter at the trial level, the holding of the Colorado Supreme Court from which Poudre seeks relief is not final within the meaning of 28 U.S.C. Section 1257. Poudre's appeal should be dismissed.

Respectfully submitted,
CITY OF GREELEY

/s/ Don K. DeFord
Counsel of Record
109 8th Street, Suite 300
Glenwood Springs, CO 81601
(303) 945-9150
Attorney for Appellee

Of Counsel:
Robert J. Loew
City of Greeley
Law Department
1000 Tenth Street
Greeley, CO 80631
(303) 353-6123

(6)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1120

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF GREELEY, COLORADO,

and

HOME LIGHT AND POWER COMPANY,
Appellee.

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On Appeal from the Supreme Court of the State of Colorado

MOTION OF APPELLEE HOME LIGHT AND POWER COMPANY TO DISMISS

WILLIAM H. ALLEN *
NICHOLAS W. FELS
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

JAMES K. TARPEY
THOMAS R. O'DONNELL
Kelly, Stansfield & O'Donnell
550 - 15th Street
Denver, CO 80202

JAMES R. McCOTTER
Vice President and General Counsel
Public Service Company of Colorado
550 - 15th Street
Denver, CO 80202

Attorneys for
Public Service Company of Colorado, Successor by Merger to Appellee Home Light and Power Company

* Counsel of Record

February 29, 1988

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal from a judgment of a state appellate court by a party that, having prevailed in the trial court without the benefit of certain defenses resting on federal statutory and constitutional claims, failed to assert such claims in briefing and arguing the state appeal.

2. Whether a state appellate court violates the due process clause of the Fourteenth Amendment by rendering judgment against a party and thereby necessarily rejecting without adverting to them certain federal statutory constitutional claims that the party has said should be available to it on a remand to the trial court.

3. A state court ruled that, even though a rural electric cooperative had a certificate of public convenience and necessity issued by the state public utilities commission entitling it to render electric service in a certain area, the cooperative must obtain a home rule city's franchise before it expands its service after the city annexed that area. The question is whether that ruling (a) impairs the obligation of a contract in violation of Article I, Section 10, of the United States Constitution, (b) deprives the cooperative of property without due process of law in violation of the Fourteenth Amendment to the Constitution, or (c) is preempted by the federal Rural Electrification Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1120

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
Appellant,

v.

THE CITY OF GREELEY, COLORADO,

and

HOME LIGHT AND POWER COMPANY,
Appellees.

On Appeal from the Supreme Court of the State of Colorado

MOTION OF APPELLEE HOME LIGHT AND POWER COMPANY TO DISMISS

Public Service Company of Colorado, the successor by merger to the named appellee Home Light and Power Company,[1] moves to dismiss the appeal on the grounds that (1) this Court lacks jurisdiction because the substantive federal questions stated in the jurisdictional statement (Questions 2, 3 & 4) were not properly preserved on appeal in the state courts and the existence of

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[1] The named appellee Home Light and Power Company was merged into Public Service Company of Colorado on November 1, 1986. Subsidiaries of Public Service Company of Colorado not wholly owned by it are Consolidated Extension Canal Company, The East Boulder Ditch Company, The Hillcrest Ditch & Reservoir Company, Las Animas Consolidated Canal Company, and The United Water Company.

the other question stated (Question 1) is dependent on them, and (2), in any event, the questions stated are so insubstantial as not to require plenary consideration by this Court.

STATEMENT

The Colorado Supreme Court has resolved a question of Colorado law having to do with the respective powers of the state Public Utilities Commission, on the one hand, and a Colorado home rule city on the other. It resolved the question by deciding that an electric utility with a PUC certificate of public convenience and necessity for a certain geographical area cannot expand its service when the area is annexed by a home rule city without obtaining a municipal franchise empowering it to lay its lines along city streets. The decision raises no conceivable federal question, and no federal claim was asserted before the Colorado Supreme Court.

The appellee Home Light and Power Company holds both a certificate of public convenience and necessity from the Colorado Public Utilities Commission and a franchise from the home rule City of Greeley empowering it to provide electric service in Greeley. The franchise, issued in 1968, states that Home Light "shall furnish electric energy within the corporate limits of the city as such limits now exist or may during the term of this franchise be extended." (Jur. St. App. A4.)

Home Light also serves some unincorporated parts of Weld County, in which Greeley is located. So does the appellant Poudre Valley Rural Electric Association, a rural electric cooperative. The two have had disputes over their respective service territories in Weld County. The disputes were litigated before the Public Utilities Commission and in the Colorado courts on review of its decision. The contesting parties then stipulated to a division of some of the disputed service territories. The stipulation was submitted to the PUC and confirmed by it in 1970 in the form of separate territorial certificates

of public convenience and necessity issued to Home Light and Poudre Valley. (*Id.*)

The territory allotted to Poudre Valley included the western edge of a Weld County subdivision known as Highland Park West. The rest of the subdivision was certificated to Home Light. In 1981 Greeley annexed territory to the south and west of the city, including Highland Park West. By that time, Poudre Valley was serving five or six customers in its territory along the western edge of the subdivision. (*Id.* at A5; *see id.* at A23.)

After the annexation, Home Light applied to the PUC for a ruling whether it had the right, because of its Greeley franchise, to serve the newly annexed part of the city, including the area certificated to Poudre Valley. (*Id.* at A29-A33.) The PUC ruled that Poudre Valley and not Home Light had the right to provide service in the area covered by Poudre Valley's certificate. (*Id.* at A34-A39.) Home Light did not seek review of the PUC decision. (*See id.* at A5-A6.)

On May 18, 1982, the Greeley City Council enacted two ordinances. One of them required any electric utility to obtain a city franchise before it could "maintain or install any wires, cables or other equipment . . . over any street, alley, sidewalk or other public place in the city." (*Id.* at A105-A109.) The other called for an election to determine whether a franchise should be awarded to Poudre Valley. The election was necessitated by a provision of the city charter (following the mandate of the Colorado Constitution as it then read) prohibiting the city from awarding a franchise except upon the vote of a majortiy at a special election. (*Id.* at A114-A122.) The special election was held, and the voters disapproved the proposed Poudre Valley franchise by nearly 4 to 1. (*Id.* at A6-A7, A20.)

Greeley then brought suit for declaratory and injunctive relief against Poudre Valley. Home Light intervened as a plaintiff seeking similar relief. Greeley originally sought to prohibit Poudre Valley from continuing to serve its existing customers in the city but later amended its complaint to ask only that Poudre Valley be barred from extending its facilities. (*Id.* at A7-A8.)

The trial court, the Weld County District Court, decided for Poudre Valley. (*Id.* at A21-A28.) According to the Colorado Supreme Court, the trial court "relied exclusively" on the supreme court's decision in *City of Englewood* v. *Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967). (Jur. St. App. A14; *see* Jur. St. 13.) In that case, the supreme court had held that a telephone utility that had received a city franchise and built its service in Englewood on the strength of it need not, in order to continue its service, renew its city franchise when it expired after 20 years because it had acquired a state franchise by taking advantage of a statute, Colo. Rev. Stat. § 38-5-101 (Jur. St. App. A93), authorizing a utility to construct, maintain, and operate its lines along public roads.

Greeley and Home Light appealed. In its brief on appeal Poudre Valley defended the judgment of the trial court both on the ground on which the court had rested its judgment and on the ground, not reached by the trial court, that the lawsuit represented an untimely effort to have review of the PUC decision that Poudre Valley could serve the part of the newly-annexed area that was certificated to it.[2] Poudre Valley did not, on

[2] We have lodged a copy of Poudre Valley's brief to the Colorado Supreme Court with the Clerk. Its untimeliness argument is at pages 25-29. The Colorado courts, like the federal courts, will sustain a trial-court judgment on any available legal ground even though that ground was not the ground of the trial court's judgment. Wells v. Premier Indus. Corp., 691 P.2d 765, 768 (Colo. App. 1984).

the other hand, attempt to defend the trial court's decision on the ground that a contrary decision would violate the United States Constitution.

The Colorado Supreme Court reversed the district court judgment. The Colorado constitutional provisions and statutes dealing with PUC certificates and municipal franchises that it analyzed demonstrated to its satisfaction that both "municipal and PUC consent are necessary to operate a public utility within a home rule city." (*Id.* at A13.) It added that the PUC was not "empowered to grant a public utility a franchise to use a home rule city's streets, alleys, and public places in the absence of the municipality's consent." (*Id.* at A13-A14.)

The question the court thus decided does not seem a very close one. The court quoted with emphasis from Article XXV of the Colorado Constitution, which empowers the legislature to provide for regulation by the PUC of utility facilities, service, and rates and charges, a proviso that "nothing herein shall affect the power of municipalities . . . to grant franchises." (*Id.* at A11-A12; *see id.* at A122.) As for the *Englewood* case, the court said that the decision there depended solely on the fact that the telephone company had obtained the consent of the city to the use of its streets in the form of the original franchise, and the expiration of the franchise could not affect the continuing ability of the company to serve its customers in the city. (*Id.* at A14-A16.)

The court ruled, in accordance with the limited relief requested by Greeley at trial, that Poudre Valley could maintain and operate its existing facilities, continuing to serve its handful of customers within the enlarged city boundaries, but, in the absence of a municipal franchise, could not extend its facilities. (*Id.* at A18.)[3]

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[3] The supreme court remanded to the district court "for further proceedings consistent with this opinion," but its opinion was explicit that Poudre Valley could not "extend its facilities as they

ARGUMENT

The Colorado Supreme Court has decided a question of state law in a way that disappoints Poudre Valley. That does not make the case a federal case. The supreme court's opinion gives no hint of the presence of any federal question. Understandably so. In briefing the case for the supreme court, Poudre Valley abandoned whatever federal claims it may have included in a wholesale list of defenses that it had formally presented, but never pressed, in the trial court. Abandonment of those claims was prudent. They were, and remain, wholly insubstantial.

The abandoned claims include those covered by Poudre Valley's second, third, and fourth questions presented. The first such question depends on the existence and substantiality of the other three. Because none of its questions was properly preserved, and none is substantial, Poudre Valley's appeal should be dismissed for want of jurisdiction or for want of a substantial federal question.

1. This Court has jurisdiction on appeal from a final decision of the highest court of a state in which a decision could be had "where is drawn in question the validity of" a state statute (which, as Poudre Valley says, includes a city ordinance) "on the ground of its being repugnant" to the Constitution or a federal statute "and the decision is in favor of its validity." 28 U.S.C. § 1257 (2).

The validity of a state statute is not "drawn in question" on a federal ground unless the federal claim of

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existed at the time of the annexation without obtaining a city franchise for that purpose" and seemed to leave no issues open. (Jur. St. App. A18.) We therefore agree with Poudre Valley's implicit assumption that the supreme court's decision is and was meant to be final, so that the district court on remand is required merely to conform its judgment to the supreme court's decision.

invalidity is asserted at the first available opportunity under state law and is preserved, in accordance with state procedures, throughout the proceeding. *See Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962).[4] Here Poudre Valley listed some 51 defenses in its answer to the complaint including some that mentioned the United States Constitution (*see* Jur. St. App. A56-A58), but it did not press any of those federal constitutional defenses in the trial court.

Poudre Valley prevailed in the trial court without the benefit of those defenses. On appeal, as we have said, it defended the trial court's decision on one state law ground that was among its reserved defenses and was therefore not relied on by the trial court. But it did not argue that the trial court's decision was compelled by federal constitutional mandate or urge any of its other reserved claims, federal or state, in support of the trial court's decision. Poudre Valley's brief on appeal made no more mention of the United States Constitution or any of its provisions than does the Colorado Supreme Court's opinion. Poudre Valley gave the supreme court no reason whatever to think that, if it decided the case against Poudre Valley, it would be taxed on an appeal to this Court with so construing a municipal ordinance as to make that ordinance violative, in its application to Poudre Valley, of several federal constitutional provisions. "[I]t is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves

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[4] For the necessity, in the Colorado courts, of preserving points on appeal in order to have them considered, *see* Merkowitz v. Mahoney, 121 Colo. 38, 43-44, 215 P.2d 317, 321 (1949); Contes v. Metros, 111 Colo. 561, 565, 144 P.2d 782, 784 (1944). Constitutional claims as well as others are abandoned if not argued. Colorado Postal Tel. Co. v. City of Colorado Springs, 61 Colo. 560, 564, 158 P. 816, 818 (1916).

their constitutionality." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). The Colorado Supreme Court was not given that opportunity in this case or given the opportunity to exercise its unquestioned competence, *see Allen* v. *McCurry*, 449 U.S. 90, 105 (1980), to decide the validity of a federal constitutional challenge to the Greeley ordinance.

All that Poudre Valley did to apprise the court below that anything more than what appeared in the body of its brief was afoot was to urge at the tail end of the brief that, if the court were minded to reverse, it should not give judgment for the appellants but should instead remand to allow the trial court to consider certain defenses that were described in an appendix to the brief.[5] The supreme court would have been thoroughly justified in treating this Appendix VI as an attempt to evade Colorado's 30-page limitation on the length of appellate briefs, Colo. App. R. 28(g), and therefore ignoring it. But, even if the court had looked at Poudre Valley's Appendix VI, it would not have found there any federal claim addressed to it. Nor would it have found the federal claims that are embodied in the questions that Poudre Valley now claims entitle it to appeal from the Colorado court's adverse judgment.

a. Appendix VI (which is a reproduction of a trial brief addressed to the trial court) contains a claim that

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[5] What Poudre Valley said at pages 29-30 of its brief in the Colorado Supreme Court is quoted with ellipses at page 2, note 5, of its jurisdictional statement. When the elided words are supplied, Poudre Valley is seen to have been making not the request for a remand to consider unresolved defenses generally that its quotation suggests but instead a request for a remand to consider specifically the defenses set forth in Appendix VI to the brief. Thus, Poudre Valley told the supreme court that the case should be remanded "because of the need for judicial attention to the issues *which are described in Appendix VI hereto* which have not yet been resolved by the District Court." Brief, note 2 *supra*, p. 30 (italicized words dropped in the quotation at Jur. St. 2 n.5).

"the United States of America, through the Rural Electrification Administration, is an indispensable party." That is quite a different claim from the one reflected in Poudre Valley's second question presented here. The claim in this Court is that the Greeley franchise ordinance and the city charter provision requiring an election before a franchise can be issued are preempted by supreme federal law in the form of the Rural Electrification Act.

b. Appendix VI asserts that "[t]he relief requested by the City and Home Light would unconstitutionally impair Poudre Valley's contract with the state and its contract with Home Light." That is absolutely all that was said on the point. No provision of the Federal Constitution—Article I, Section 10, or any other—was mentioned. The Colorado Constitution contains a clause prohibiting the impairment of the obligation of a contract. Colo. Const. Art. II, § 11. An amicus supporting Poudre Valley argued contract impairment to the supreme court under the Colorado Constitution, with reference exclusively to Colorado authorities.[6] If, then, it had consulted Appendix VI at all, the Colorado Supreme Court could fairly have assumed that Poudre Valley likewise had meant to invoke only Section 11 of Article II of the Colorado Constitution in the trial court. *Cf. New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67-69 (1928).

Moreover, even if it were thought that Poudre Valley had by its one-sentence claim of contract impairment effectively sought the protection of Article I, Section 10, of the United States Constitution, the claim as addressed to the trial court in the trial brief and reiterated in the supreme court in Appendix VI was not so phrased as to draw in question the validity of any Greeley enactment. The claim as stated by Poudre Valley runs against the

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[6] *See* Brief of Amicus Curiae The Colorado Rural Electric Association, Colo. Sup. Ct. No. 85-SA-293, pp. 18-19.

"relief requested" by the plaintiffs and not against any state statute or city ordinance. At the very least, then, Poudre Valley has not preserved any such contract-impairment claim as would entitle it to appeal to this Court.

c. Very much the same thing can be said of the only due process claim asserted in Poudre Valley's Appendix VI. Whatever that claim was, it was not a federal claim. Poudre Valley spoke in Appendix VI of "due process problems" without mentioning the Fourtenth Amendment. It quoted the PUC decision on Home Light's application for a declaration of rights. There the Commission had stated a rule of Colorado due process law: that a utility's certificated area is a property right that cannot be taken away from it except by due process of law, and that due process is satisfied only by substantial evidence of the inability or unwillingness of the certificate holder to serve and of the public convenience and necessity requiring a change. The Colorado Supreme Court showed that it was quite aware of this state-law doctrine. It paraphrased the same passage from the PUC decision that Poudre Valley quoted and at another point in its opinion cited a case where it, the court, had enunciated the Colorado due process rule.[7] (Jur. St. App. A5, A12-A13.) The court obviously thought that it was acting consistently with its rule. It was given no reason to think that it was confronted by any federal due process claim.

Moreover, whatever due process claim was stated in Appendix VI was, again, addressed to the relief requested and not to any Greeley ordinance or city charter provi-

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[7] The cited case is Public Serv. Co. v. PUC, 174 Colo. 231, 234, 483 P.2d 1337, 1339 (1971). For other enunciations of the Colorado rule, *see* Public Serv. Co. v. PUC, 174 Colo. 470, 476, 485 P.2d 123, 126 (1971); Western Colo. Power Co. v. PUC, 163 Colo. 61, 68-69, 428 P.2d 922, 926-27 (1967). In none of the cases is any federal authority under the Fourteenth Amendment cited.

sion. Poudre Valley thus has no right of appeal to this Court on any due process claim.

In its petition for rehearing, Poudre Valley attempted to repair its failure to preserve in the Colorado Supreme Court the questions it now purports to present here. (*Id.* at A48-A58.) How adequate its repair job was need not be considered because of this Court's familiar rule that, in general, when a federal question is raised for the first time (or is raised for the first time on appeal) in a petition for rehearing, it comes too late unless the state appellate court actually entertains and rules on the belated federal claim. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910); *McCorquodale* v. *Texas*, 211 U.S. 432, 437 (1908). The Colorado Supreme Court denied Poudre Valley's petition for rehearing without comment. (Jur. St. App. A43.)

2. If Poudre Valley is thought to have clung by a thin thread to any of its federal claims so as to entitle it to have one or more of them considered on their merits, they have no merit. The Court can properly dispose of them summarily if it believes that any of them are legitimately before it. And, if any of the questions are thought to have been preserved but not to be appeal questions, none of them is substantial or important enough to move the court to exercise its discretionary certiorari jurisdiction.

a. Poudre Valley asserts (Question 2; Jur. St. 17-19) that it cannot be made to obtain a city franchise if it wants to expand its service in West Highlands because its property is mortgaged to the Rural Electrification Administration and the Rural Electrification Act does not allow such treatment of mortgagors under the Act. The Rural Electrification Act does not preempt the power of state and municipal agencies to regulate the service and the rates of rural electric cooperatives that are REA mortgagors. This Court held in *Arkansas Elec. Coop. Corp.* v. *Arkansas PSC*, 461 U.S. 375, 383-89

(1983), that state regulation of wholesale rates charged by a rural electric cooperative was not preempted by the Rural Electrification Act. In doing so, it made clear that its decision applied to the regulation of retail rates as well. *Id.* at 386-87. There is no basis for distinguishing state regulation of the service a rural electric cooperative can provide from state regulation of the retail rates it can charge.

Poudre Valley has subjected itself to Colorado's regulation of its service. It complains here of a particular aspect of the regulation that is not to its liking. But nothing in the Rural Electrification Act says that cooperatives must always win in disputes before state public service commissions or state courts. The analogy Poudre Valley would draw in its preemption argument is farfetched. It has been allowed to continue to serve its existing customers in the City of Greeley but prohibited from expanding its services unless it obtains a municipal franchise. That is nothing like the attempted condemnation of a cooperative's property mortgaged to the REA, which has been held to be forbidden in the absence of REA approval by a reasonable judicial extension of 7 U.S.C. § 907, requiring the REA's approval of the sale of a cooperative's mortgaged property. *Public Util. Dist. No. 1* v. *United States*, 417 F.2d 200 (9th Cir. 1969) (Jur. St. 18).

b. For its claim that Colorado has impaired the obligations of its contracts (Question 3), Poudre Valley relies on two decisions of this Court. (Jur. St. 19-21.) It invokes *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942), for the statement in that opinion that in a case legitimately arising under Article I, Section 10, "the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court."

It relies on *Russell* v. *Sebastian*, 233 U.S. 195 (1914), for the holding that a gas utility that had begun serving a city when the state constitution allowed it to do so without the city's leave could maintain and expand its service in the city despite a subsequent constitutional amendment enabling the city to require the utility to obtain a franchise and city action pursuant thereto. That is not this case.

Poudre Valley's claimed "contract" with the state is a contract that it asserts was formed when it strung lines along Colorado roads as it was allowed to do by Section 38-5-101 of the Colorado Revised Statutes. It also claims impairment of the obligations of its market-division agreement with Home Light (Jur. St. 28-29), but that agreement is incorporated into its certificate of public convenience and necessity issued by the PUC. If Poudre Valley has any contract with the state, it is that certificate.[8] The certificate is subject to the proviso of Article XXV of the Colorado Constitution. The proviso said, and says, in so many words that the powers of the PUC, including its power to issue such certificates, do not affect the power of municipalities "to grant franchises." (*See* p. 5, *supra*.) The words are so plain that, if this Court were to make an independent examination of the "nature and extent of [the] obligation" of that contract, it would be bound to agree with the Colorado Supreme Court that the state's obligation and Poudre Valley's correlative right were limited by Greeley's power to require a franchise.

The reason why Poudre Valley relies on the statute allowing it to string its lines along roads (described as an offer accepted by its act of stringing the lines) is that the statute was held in the *Englewood* case (p. 4, *supra*)

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[8] The contract-impairment argument that Poudre Valley's supporting amicus made under the Colorado Constitution (*see* p. 9 n.6, *supra*) concerned the PUC certificate and the agreement with Home Light.

to establish a state franchise that made it unnecessary for the telephone company in that case to renew its city franchise. It is obvious from the more than six pages of argument devoted to it in this section of its jurisdictional statement that Poudre Valley's real quarrel is with the Colorado Supreme Court's having distinguished its *Englewood* precedent. (Jur. St. 23-29.) But the ground of distinction—the phone company's prior city franchise, p. 5, *supra*)—was there all along for all to see. Section 38-5-101, like the PUC's power to issue certificates of public convenience and necessity, is subject to municipal consent when city streets are involved. *See* Colo. Rev. Stat. § 38-5-108 (Jur. St. App. A-93). In the *Englewood* case, consent was obtained in the form of the original franchise; in this case, there has been no municipal consent. A litigant's profession of surprise or even anguish that a precedent has been distinguished instead of being taken as authority for a decision in its favor does not turn a simple state-law decision into an impairment by the state of the obligation of a contract.

c. Poudre Valley's vague and cursorily-stated due process claim (Question 4, Jur. St. 29) is just as easily disposed of. Poudre Valley quotes *Frost* v. *Corporation Comm'n*, 278 U.S. 515, 520 (1929), to the effect that a franchise granted by a state "in consideration of the performance of a public service . . . constitutes a property right within the protection of the Fourteenth Amendment." So much may be acknowledged. But it is familiar and unquestioned law that state law determines the extent of the property right for purposes of the due process clause of the Fourteenth Amendment. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985); *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 577-78 (1972). And here the Colorado Supreme Court has decided that, in the absence of a municipal franchise, Poudre Valley's property right in the annexed area of Greeley was limited to the right to continue serving its existing customers.

3. There is, finally, Poudre Valley's claim, which by its acknowledgement is not a claim that justifies an appeal, that it was deprived of something without due process of law because the Colorado Supreme Court neither expressly passed on certain of Poudre Valley's defenses itself nor remanded the case to the trial court for consideration of them. (Question 1, Jur. St. 15-16.) We leave to one side whether any of those defenses were sufficiently brought to the supreme court's attention to charge it with knowledge of them. For, in the end, Poudre Valley's complaint is that the Colorado Supreme Court ruled against it silently on those defenses (just as it did with respect to the claim of untimeliness that Poudre Valley argued and the state contract-impairment claim that an amicus presented).

Poudre Valley cannot assert that the case had to be returned to the trial court for the taking of evidence on its defenses. There had already been a six-day trial. (Jur. St. 13.) The defenses presented questions of law that the supreme court was as well equipped as the trial court to answer. We have seen how insubstantial are even what Poudre Valley apparently considers the most cogent of its federal defenses. It is not a ground for review in this Court that a state's highest court did not think it necessary to comment on such flimsy claims.

CONCLUSION

The appeal should be dismissed either for want of jurisdiction or for want of a substantial federal question. If it is dismissed for want of jurisdiction on appeal (as opposed to want of jurisdiction to review at all) and the jurisdictional statement is treated as a petition for certiorari, certiorari should be denied.

Respectfully submitted,

WILLIAM H. ALLEN
NICHOLAS W. FELS
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

JAMES K. TARPEY
THOMAS R. O'DONNELL
Kelly, Stansfield & O'Donnell
550 - 15th Street
Denver, CO 80202

JAMES R. MCCOTTER
Vice President and General Counsel
Public Service Company of Colorado
550 - 15th Street
Denver, CO 80202

Attorneys for
Public Service Company of Colorado,
Successor by Merger to Appellee
Home Light and Power Company

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No. 87-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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a Colorado corporation,

Appellant,

v.

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a municipal corporation,
and HOME LIGHT AND POWER COMPANY,
a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO DISMISS

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, Suite 2440
Denver, CO 80202
(303) 292-1500

Of Counsel
RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th Street, #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

March 3, 1988

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SUMMARY OF ARGUMENT

Poudre Valley Rural Electric Association, Inc. ("Poudre") timely raised its Federal Constitutional defenses below, and Public Service Company of Colorado's ("Public Service") argument in its Motion to Dismiss that Poudre abandoned its defenses is based on citations of inapplicable authorities, unsupported assertions and misleading and out of context quotations from Poudre's Brief on Appeal before the Colorado Supreme Court ("Poudre's Brief on Appeal"), rather than the "record as a whole."

Public Service's arguments on the merits ignore controlling decisions of this Court.

The City of Greeley ("Greeley") concedes in its Motion to Dismiss that Poudre is entitled to its "day in court" on its unresolved defenses and, accordingly, should have no objection to a remand for a consideration by the Colorado District Court of these issues.

ARGUMENT

I. POUDRE TIMELY RAISED ITS FEDERAL ISSUES BELOW.

> It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, "[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 85 n.9, 100 S. Ct. 2035, 2043 n.9, 64 L.Ed.2d 741, 755 n.9 (1980), quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184, 187 (1928) (emphasis added).

At page 3 of its Motion to Dismiss, Greeley concedes that Poudre properly raised its unresolved defenses. Public Service also concedes (at page 7 of its Motion to Dismiss) that the defenses reproduced at A56-58[1] were properly raised, but asserts that Poudre "did not press any of those federal constitutional defenses in the trial court." That statement is not only unsupported, but could only be made by someone, like each of Public Service's counsel before this Court, who did not participate in the proceedings before the Colorado District Court.

At pages 11 through 14 of Poudre's Jurisdictional Statement, Poudre demonstrated in detail that the record as a whole shows Poudre raised its defenses below in a timely fashion. Not only were each of Poudre's Federal Constitutional defenses raised in Poudre's Answers, but these defenses were preserved as issues for trial in Poudre's Pretrial Statement filed pursuant to Section 1-18 of Colo.R.Civ.P. 121, which was then incorporated by reference in the Pretrial Order (Vol. 3, p. 856).[2] Moreover, on the sixth and last day of trial, the District Court permitted Poudre to answer Greeley's Amended Complaint by incorporating by reference its previous Answer as well as the arguments it had raised in its Motion to Dismiss the Amended Complaint (Vol. 10, p. 69). As described in detail at pages A56-58, the previous Answer raised the federal issues which are now before this Court.

The substantial evidence in the record to support Poudre's defenses, which Poudre summarized in its Jurisdictional Statement, also shows that Public Service is simply not being candid when it asserts that these defenses were not pressed at trial. Public Service's argument appears to be based on nothing more than the fact that, because the District Court ruled in Poudre's favor on other grounds, these constitutional

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1. Citations to the separately paginated appendices to Poudre's Jurisdictional Statement are in the form of "A____."

2. Record references are to the volume and page number of the record before the Colorado Supreme Court, *e.g.*, Vol. ____, p. ____.

issues were not reached by the District Court under the well-settled principle "that a court will not rule on a constitutional question that is not essential to disposition of the case before it." *Mountain's Shadow Inn, Inc.* v. *Colorado Dep't of Labor*, 672 P.2d 522, 525 (Colo. 1983). *See also* Greeley's concession at page 3 of its Motion to Dismiss that "a determination on the issues upon which Poudre now seeks review was not necessary at the trial court level."

Public Service's argument that Poudre failed to preserve its unresolved defenses on appeal is equally flawed. In addition to totally misrepresenting what was said in Poudre's Brief on Appeal, Public Service's argument overlooks the fact that Poudre's "Conclusion" in its Brief on Appeal before the Colorado Supreme Court was not an attempt to raise issues on appeal, but rather reminded the Colorado Supreme Court of the procedural posture of the case, *i.e.*, that there were substantial unresolved issues not reached by the District Court which would need to be addressed by the District Court on remand if the Colorado Supreme Court did not affirm the District Court's judgment.

Moreover, it cannot be contended that Poudre (which was an Appellee) failed to preserve issues on appeal. Poudre, who prevailed below on the issue of whether it needed a city franchise, in addition to its state franchise granted by § 38-5-101, C.R.S., had nothing to appeal with respect to that aspect of the District Court's Order.

There is nothing in the authorities cited by Public Service, each of which involved a failure to preserve issues by Appellants, and not Appellees, which required Poudre to raise each of its defenses as an additional ground for affirmance in order to preserve them.

Public Service's argument that, to the extent the defenses raised solely questions of law, the Colorado Supreme Court could have ruled on them, overlooks the fact that many of Poudre's unresolved issues involved issues of fact, as to

which the District Court had not made findings of fact and conclusions of law.

Moreover, as just discussed, Poudre, as the prevailing party in the District Court, was not required to raise these additional grounds for affirmance in the Colorado Supreme Court because they had not yet been reached by the District Court.

Even assuming that Poudre as an Appellee had an obligation to advise the Colorado Supreme Court of the unresolved issues, it clearly did so. Public Service's argument about what the Colorado Supreme Court must have been thinking when it issued its opinion is based on the incorrect assumption that all the Colorado Supreme Court had before it was Public Service's out of context and incomplete quotations from Poudre's Brief and the Appendix thereto. As shown below, the Colorado Supreme Court had the entire record as well as Poudre's record citations to the unresolved defenses which clearly showed that the Federal Constitution had been invoked by Poudre.

For example, Public Service's Motion to Dismiss omits to quote the following language from page 29 of Poudre's Brief on Appeal before the Colorado Supreme Court:

> However, because of its ruling in Poudre Valley's favor, the District Court did not rule on any of the other issues raised by Poudre Valley as defenses other than the conspiracy defense.[17]

Footnote 17 on page 29 of Poudre's Brief on Appeal before the Colorado Supreme Court read as follows:

> For example, on the first day of trial the Court reserved ruling on the issues raised by Poudre Valley's Motion to Dismiss the City's Amended Complaint. Vol. 5, p. 19, line 16. For the Court's information, copies of some pages from the District

> Court describing these issues are attached hereto as Appendix VI. These materials and others reflecting unresolved defenses are found in the record as follows: Vol. 1, p. 79; Vol. 2, p. 346; Vol. 2, p. 494; Vol. 3, p. 863 (emphasis added).

The second and third record references in footnote 17 were to Poudre's Answer to Greeley's Complaint and its Answer to Home Light's Complaint in Intervention, which raised the defenses which are summarized at A56-58, and which Public Service concedes at page 7 of its Motion raised Federal Constitutional defenses.

The fourth record reference in footnote 17 (Vol. 2, p. 494) is to page 12 of Poudre's March 23, 1984 Summary Judgment Memorandum. At pages 12 and 13 of this Summary Judgment Memorandum, which is incorporated by reference at page 1 of the Trial Brief reproduced in part at Appendix VI to Poudre's Brief on Appeal, Poudre clearly repeated (what it had already alleged in its Answers, *see* ¶¶ 5 and 6 at A57) that the impairment issue was one of Federal Constitutional law:

> Granting the relief requested by the City and Home Light would unconstitutionally impair Poudre Valley's contract right obtained as a consequence of the franchise it has from the State in violation of Article I, Section 10 of the United States Constitution. See Russell v. Sebastian, 233 U.S. 195 (1914) (City ordinance adopted pursuant to a State Constitutional Amendment requiring a grant of permission from the city unconstitutionally impaired the contract rights of a utility who had built its facilities pursuant to a state grant of permission similar to the State franchise granted to Poudre Valley) (emphasis added).

Public Service's Motion to Dismiss also neglects to mention the following language found at page 17 of Poudre's Trial Memorandum (reproduced at Appendix VI to its Brief on

Appeal) which shows that the federal supremacy argument, in addition to being raised in the Answers, which are referred to by the second and third record references in note 17 of Poudre's Brief on Appeal (see ¶ 11 at A58), was also raised in the excerpt from the Trial Brief reproduced at Appendix VI to Poudre's Brief on Appeal:

> See also Public Utility District No. 1 of Pend Oreille County v. United States, 417 F.2d 200 (9th Cir. 1969) (Condemnation of an REA-financed utility violated the supremacy clause of the Constitution of the United States because "if, as a result of the condemnation, the loans to Inland were paid in full but the remaining portions of the system could not continue to operate with decent service and at decent rates, the Government would have been paid but the purpose of the Rural Electrification Act would have been frustrated." 417 F.2d at 201) (emphasis added).

Finally, Public Service's argument overlooks the fact that Poudre's entitlement to its "day in court" on its unresolved defenses, including those raising matters of state law, is itself a matter of federal due process.

II. PUBLIC SERVICE'S ARGUMENTS ON THE MERITS IGNORE CONTROLLING DECISIONS OF THIS COURT.

Public Service's argument that *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1, (1983) held that all state regulation of REA-financed utilities is permissible under the Supremacy Clause ignores the following language in that opinion:

> [A] particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans,

as to be implicitly pre-empted by the Rural Electrification Act.

461 U.S. at 389, 103 S.Ct. at 1915, 76 L.Ed. 2d at 13.

Public Service's argument that there is no supremacy issue because Poudre can continue to serve its existing customers ignores (1) the District Court's finding that granting the relief requested by Greeley "would prevent adequate service to rural territory in the vicinity of expanding cities" (emphasis added) (A26) and (2) the evidence (summarized in Poudre's Jurisdictional Statement at pages 8 and 9 and at note 10 on page 10) of Poudre's investment to prepare to serve the potential population which includes substantial growth subsequent to annexation.

Public Service's attempt to distinguish *Russell* v. *Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912 (1914) overlooks the cases cited at pages 21 and 22 of Poudre's Jurisdictional Statement.

Public Service's argument, on page 13 of its Motion to Dismiss, not only ignores *Russell* v. *Sebastian, supra*, but neglects to mention the fact that Article XXV of the Colorado Constitution was passed in 1954, 14 years after Poudre accepted the offer in §38-5-101, C.R.S., in 1940. *See City of Englewood* v. *Mountain States Telephone & Telegraph Co.*, 163 Colo. 400, 403-04, 431 P.2d 40, 42 (1967) for the effective date of Article XXV and page 22 of Poudre's Jurisdictional Statement for a description of the evidence showing Poudre accepted the offer in 1940.

Public Service also overlooks the fact that in *Russell* v. *Sebastian, supra*, the California Supreme Court had resolved the question as a matter of state law, but the state court construction of state law could not be sustained when the law had the effect of impairing the obligation of the state's contract with the utility created when the utility, like Poudre, built its facilities to provide utility service and therefore

accepted the state's offer. Moreover, in making its determination as a matter of Federal Constitutional law, this Court concluded in *Russell* v. *Sebastian, supra,* that, given the utility's preparation to serve, the only construction of California law was to permit the utility not only to maintain but extend its existing facilities. 233 U.S. at 208, 34 S.Ct. at 521-22, 58 L.Ed. at 923.

Public Service also mischaracterizes the holding in *City of Englewood, supra.* See Poudre's Jurisdictional Statement at pages 25 through 28.

Public Service's argument that the state can take Poudre's franchise from it without due process of law flies in the face of *Frost* v. *Corporation Commission,* 278 U.S. 515, 520, 49 S.Ct. 235, 237, 73 L.Ed. 483, 487 (1929), discussed at page 29 of Poudre's Jurisdictional Statement.

III. GREELEY CONCEDES POUDRE IS ENTITLED TO ITS "DAY IN COURT" ON ITS UNRESOLVED DEFENSES.

While Public Service argues (in note 3 at page 6 of its Motion to Dismiss) that the District Court is not free to consider Poudre's unresolved defenses, the thrust of Greeley's Motion to Dismiss is that the Colorado District Court is free to consider Poudre's unresolved defenses. Given this position, Greeley should have no objection to a remand by this Court for a consideration of these unresolved issues.

CONCLUSION

Contrary to the suggestion at page 15 of Public Service's Motion to Dismiss, Poudre is not asking for remand for the "taking of evidence." Rather, Poudre asks that, if this Court does not either summarily reverse or note probable jurisdiction, the matter be remanded to the Weld County District Court, so that the District Court can make findings of fact

and conclusions of law with respect to the evidence which is already before the Court.

Respectfully submitted,

KENNETH L. STARR
Counsel of Record
HOLMES & STARR
A Professional Corporation
717 17th Street, #2440
Denver, CO 80202
(303) 292-1500

Of Counsel
RANDOLPH W. STARR
RANDOLPH W. STARR, P.C.
221 East 29th St., #220
P.O. Box 642
Loveland, CO 80539
(303) 667-1029

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On Appeal from the Supreme Court of the State of Colorado

BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, COLORADO RURAL ELECTRIC ASSOCIATION AND TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., AS AMICI CURIAE IN SUPPORT OF THE APPELLANT

JOHN J. CONWAY
4704 Harlan Street
Suite 500
Denver, CO 80212
(303) 458-7117
Attorney for Amici Curiae Colorado Rural Electric Association and Tri-State Generation and Transmission Association, Inc.

WILLIAM T. CRISP, II *
CRISP, DAVIS, SCHWENTKER, PAGE & CURRIN
3739 National Drive
Suite 225
Post Office Drawer 30489
Raleigh, NC 27622
(919) 787-4007
Attorney for All of the Named Amici Curiae

* Counsel of Record

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INTERESTS OF THE AMICI CURIAE

The interests of the *amici curiae* in this appeal are, respectively as follows: [1]

[1] These interests are further articulated in the next portion of this Brief, entitled "Additional Information and Data Showing Interests of the Amici."

National Rural Electric Cooperative Association (NRECA) is a District of Columbia cooperative trade-service organization representing virtually all of the nearly 1,000 electric cooperative and public utility district borrowers of the United States Rural Electrification Administration (REA). These borrowers include the Appellant (Poudre Valley or Appellant) and its wholesale power supplier, Tri-State Generation and Transmission Association, Inc. (Tri-State), another *amicus curiae* in this appeal.

Rural electric distribution cooperatives such as Poudre Valley are responsible for electric service in 70-75% of the nation's total land area, including Alaska. Thus NRECA's interests—more importantly, the interests of NRECA's constituent member systems—are such as to compel a profound and sensitive concern for the outcome of this appeal.

* * * *

National Rural Utilities Cooperative Finance Corporation (CFC) is also a District of Columbia cooperative organization whose membership consists of 983 of the nation's electric cooperatives and their affiliated organizations. These include the Appellant and Tri-State, whose interest is set forth *infra* as well as all but one of the other 23 electric cooperatives domiciled in Colorado. CFC provides its members with debt capital, either solely, as in the case of financing pollution control bonds, or supplementally to funds borrowed by them from REA. CFC is a nonprofit cooperative.

* * * *

The *amicus* Colorado Rural Electric Association (CREA) is a Colorado corporation formed for the purpose of promoting the general welfare and interests of rural electric cooperatives in Colorado. It presently has 25 electric cooperative members, including all but four of such cooperatives domiciled or doing business in Colorado. (The Appellant is a CREA member.) The vast

majority of CREA's members hold certificates of public convenience and necessity issued to them by the Colorado Public Utilities Commission. These certificates authorize and obligate them to provide electric service on an exclusive basis within specifically defined territories in the state.

Rural electric cooperatives are obligated to serve approximately 75% of the land area of Colorado. Virtually all of these cooperatives are financed in whole or in part by REA and CFC. All but two of them obtain their wholesale power and energy either from Tri-State or Colorado-Ute Electric Association, Inc., a nonprofit cooperative.

* * * *

Tri-State is a nonprofit cooperative which supplies electricity at wholesale to its 25 members, all of which are electric cooperatives or public power districts located in Colorado, Nebrask or Wyoming. These members in turn serve residences, farms, ranches, small towns, businesses, industries, schools and churches. Of the 25 members, 11 are located in Wyoming, six in Nebraska and eight in Colorado. Combined, they deliver electricity to some 141,000 meters. Of those meters, approximately 84,000 are located in Colorado. (The Appellant is a Tri-State member.)

The members of Tri-State are obligated to serve an area of approximately 100,000 square miles, and over 90,000 square miles of this area have been certificated for such service by state regulatory commissions. The area served by these members is approximately the size of the six New England states plus the state of New York.

Tri-State is one of 57 generation and transmission cooperatives which supply electricity at wholesale in the United States. It is financed primarily through REA, the Federal Financing Bank (FFB), CFC and pollution control revenue bonds issued by Moffat County, Colorado,

and Platte County, Wyoming. Tri-State has facilities which cost some $800 million. Its members have total assets of some $500 million, of which approximately $256 million are located in Colorado.

ADDITIONAL INFORMATION AND DATA SHOWING THE INTERESTS OF THE *AMICI CURIAE*[2]

All of the *amici*—and all of their constituencies, which include virtually all existing entities financed by REA since its inception in 1936, *see* 7 U.S.C. Sections 901-950b (1980),—are directly or indirectly concerned with providing adequate, reliable electric service throughout operating areas in 46 of the 50 states, on a nonprofit basis and at the lowest cost consistent with sound business principles. They and and the federal government have worked closely together for over 50 years in a joint effort.

Consider certain relevant data[3] as of the end of 1986 for all REA borrowers:

—Long-term loans outstanding (multi-billions had already been paid off):

Source	Amount
REA	$19.4 billion
REA-Guaranteed	$31 billion
Non-REA Guaranteed	$ 7.7 billion[4]
TOTAL	$58.1 billion

[2] We urge the Court's particular attention to this section of our Brief. Not only does it set forth certain of the reasons underlying our profound concern for the outcome of this appeal; it also contains data which strongly buttress certain of our legal arguments, *infra*.

[3] These data are taken from 1986 Statistical Report, Rural Electric Borrowers, United States Department of Agriculture, Rural Electrification Administration, REA Bulletin Number 1-1. 1986 was the latest year for which these data were available when this Brief was prepared.

[4] Approximately $5.23 billion of this amount were provided by CFC.

—Total miles of electric line in place: 2,122,550
—Total consumers served: 11,357,105
—Average consumers per mile of line: 5.4

Consider, now, the same relevant data for Colorado as of the end of 1986:

—Long-term loans outstandoing (multi-billions had already been paid off):

Source	Amount
REA	$871 million
REA-Guaranteed	$ 1.42 billion
Non-REA Guaranteed	$317 million [5]
TOTAL	$ 2.6 billion

—Total miles of electric line in place: 59,339
—Total consumers served: 299,970
—Average consumers per mile of line: 5

The foregoing data emphasize three cardinal facts that bear on this appeal:

First, the United States has engaged in a national program of rural electrification by virtue of which, through direct and guaranteed loans, it, as well as others, primarily CFC, has invested—has loaned at considerable risk—an enormous amount of the nation's money. Impairment of the security of that investment is of paramount importance to both REA and its borrowers, whose credit is necessarily involved in any legal-operating context in which the income-producing potential of facilities thusly capitalized and markets thusly planned to be served are arbitrarily lost.

Second, impairment, if indeed not total loss, of such security—and of the related markets whose payments for service underpin such security—frustrate and obstruct the achievement of the national policy of rural electrification; at minimum, such impairment reduces, if it does not wholly destroy, the viability of the national rural electrification program.

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[5] Most of this amount was provided by CFC.

And third, the remnant populace which must "pick up the slack" and make good the loss suffered by such impairment is charged a punitive price.

Consider the relative poverty of operations already borne by Colorado's rural electric consumers: The largest electric cooperative (Intermountain) serves about 45,000 meters and has a density of about 7.23 consumers per mile of line, whereas the smallest one (White River) serves only about 2,300 and has a density of about 2.94 per mile of line.

* * * *

Tri-State has all-requirements contracts running through the year 2020 with all of its 25 members. Under the terms of these contracts, Tri-State is obligated to supply all of the power and energy requirements of its members. They in turn, are required to purchase all of their power and energy requirements from Tri-State.

To carry out this responsibility, Tri-State annually obtains from its members their load forecasts for the following 15-year period. These forecasts then are aggregated to determine the total amount of power and energy which Tri-State will require during those years.

Tri-State already has lost more than 50,000 kilowatts of load growth because of the loss of territory by its members in Colorado through annexation. Typically, municipalities annex high density developments with a relatively high number of consumers per mile of line. The more sparsely populated rural areas where load factors are typically lower are left, and consumers in these areas must pay not only for the more costly distribution system but also for the high fixed costs of unused capacity built to serve the loads lost to annexation. The estimated economic impact on Colorado's rural economy due to the loss of 50 MW of load is approximately $5 million per year. If Nebraska and Wyoming

loads are taken into account, the total impact is about $10 million per year.

If projected loads fall short of the forecast levels due to annexation, poor economic conditions, or other reasons, Tri-State will be required to increase its rates to its members and they, in turn, must increase rates to *their* consumer members. These increases, in turn, cause demand to decline, and the reduction in loads results in yet more rate increases since fixed costs have to be recovered from fewer units sold. This process, all too accurately, has been termed a "death spiral." Ever higher prices make it increasingly difficult for Tri-State's members to attract or retain industrial and commercial customers, which further accelerates the death spiral. The result of such spiral is unused generating capacity and increasingly higher electric rates to consumers in rural Colorado.

SUMMARY OF ARGUMENT

We simply adopt as our own the argument of the Appellant that it has not had its day in court.

The federal program of rural electrification, implemented pursuant to 7 U.S.C. Sections 901-950b (1980), must be recognized and respected by Colorado. That program is frustrated if REA borrowers, such as Poudre Valley and Tri-State, lose the benefits of promising markets developing in Poudre Valley's certificated service areas. The Federal Supremacy Clause, U.S. Const. art. VI cl. 2, requires that Colorado's Supreme Court be overruled for having so frustrated that program.

Greeley's ordinance requiring Pourde Valley to obtain a municipal franchise, as held by the Colorado Supreme Court, constitutes an unconstitutional impairment of Poudre Valley's contract with the state created when Poudre Valley accepted the offer in Col. Rev. Stat. Section 38-5-101 by building its facilities on the highways of the State of Colorado.

At minimum, judicially compelled loss without compensation by Poudre Valley of such contract rights constitutes a deprivation of a valuable property without due process of law.

We have read and we adopt as correct the Appellant's Statement of the Case and its statement of the Questions involved in this appeal. We have also read and fully adopt and support the Appellant's Arguments. We will hereafter supplement those Arguments with as much economy of verbiage as possible.

ARGUMENT

Proposition Number One

APPELLANT HAS NOT HAD AN ADJUDICATION OF SEVERAL FEDERAL CONSTITUTIONAL DEFENSES IT RAISED IN THIS CASE. FUNDAMENTAL FOURTEENTH AMENDMENT LAW REQUIRES THAT IT BE GRANTED ITS "DAY IN COURT."

(We simply adopt in toto the Appellant's argument, based on U.S. Const. amend. XIV, in support of this Proposition.)

Proposition Number Two

THE FEDERAL SUPREMACY CLAUSE PROHIBITS COLORADO'S DEPRIVATION OF POUDRE VALLEY'S RIGHT TO EXTEND AND FURNISH SERVICES IN THE DISPUTED AREA FROM FACILITIES FINANCED BY REA UNLESS POUDRE VALLEY OBTAINS A FRANCHISE FROM GREELEY.

The Weld County District Court made the following uncontroverted finding of fact:

> To allow the expulsion of a [sic] electric utility from portions of its certified territory by virtue of annexation of that territory by a municipality which franchises another utility would create serious problems. It would handicap the certificated electric utility in providing suitable service to its territory because

> long term planning would be difficult or impossible. Large scale investment in plant and equipment could not be jusitified [sic] if the utility were subject to expulsion at the whim of adjoining cities. *These and other similar considerations would prevent adequate service to rural territory in the vicinity of expanding cities.*

Jurisdictional Statement, at 17-18; Vol. 3 at 1029; A26. (Emphasis added by these *amici.*)

The primary purpose of the Rural Electrification Act, 7 U.S.C. Sections 901-950b (1980), is to make reliable and adequate electric service available at affordable rates. This purpose is frustrated where, as a result of loss of service areas, "the remaining portions of the electric system could not continue to operate with decent service and at decent rates." *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200, 201 (9th Cir. 1969). In that case, a Washington State PUD attempted to acquire by condemnation a portion of the territory served by Inland Power and Light Company, a cooperative financed by REA. Even though Inland's territory was not certificated to it by a state regulatory commission and was not otherwise legally assured, and even though there was no contention of unconstitutionality or illegality otherwise of the PUD's condemnation statute, the court, invoking the Federal Supremacy Clause, restrained the PUD's taking.

The implications of Colorado's holding, portending disastrous financial consequences for the Colorado REA-financed cooperatives, presage ominous results for hundreds of electric cooperatives similarly faced with annexation by municipalities throughout the other 45 states in which they operate. This Court ought to note probable jurisdiction accordingly and remove that threat to the continued viability of the national rural electrification program.

Proposition Number Three

GREELEY'S CHARTER ARTICLE XVIII, ITS ORDINANCE NO. 26 AND THE COLORADO SUPREME COURT'S APPLICATION AND ENFORCEMENT OF THE SAME CONSTITUTE AN UNCONSTITUTIONAL IMPAIRMENT OF THE APPELLANT'S CONTRACTS.

A Colorado statute, Colo. Rev. Stat. Section 38-5-101, expressly grants to electric entities such as Poudre Valley the right to construct, maintain and operate electric lines along, across, upon, and under the public highways of the State. *See* Appendices to Jurisdictional Statement A93.

The record establishes that Poudre Valley commenced construction of its system in Weld County, Colorado, in 1940, pursuant to a permit issued in that year by the County. *See* Appendices to Jurisdictional Statement A101 and Exhibits 103, 125 and 126. The record also shows that Poudre Valley and Home Light and Power Company (now the Appellee Public Service Company of Colorado), so as to resolve a long-standing dispute as to which one could serve in various parts of Weld County, entered into an agreement in 1970 defining the boundaries of the territory which each would be certificated on an exclusive basis. The Public Utilities Commission (Commission) approved this agreement and certificated the territory here in question (as well as other territory) to Poudre Valley to serve on an exclusive basis (Exhibits 1 and 11). As noted in the Jurisdictional Statement at 8, at the time of this certification and at the time of Appellant's construction of facilities along, across, upon and under certain of the highways of Colorado pursuant to the provisions of Colo. Rev. Stat. Section 38-5-101, no part of Poudre Valley's certificated territory was within the City of Greeley.

The record also shows that in 1981 Home Light and Power Company filed an application with the PUC seek-

ing to have Poudre Valley expelled from serving the portion of Pourde Valley's certificated territory that was annexed by Greeley (which is the same territory herein involved). Appendices to Jurisdictional Statement A29. The Commission denied this application, holding:

> No showing was made in this proceeding that Poudre Valley is unwilling or unable to serve in the certificated area in question, nor was any showing made that the public convenience and necessity requires a change in utilities.
>
> A certificated area constitutes a property right which cannot be taken away except by due process of law. Colo. Rev. Stat. Section 40-5-101(2) (1973). Due process of law is met where there is substantial evidence of record to support a finding that the certificated utility is unwilling or unable to serve its certificated area, and the public convenience and necessity requires a change.

Appendices to Jurisdictional Statement A34, A37.

The Commission also held that Home Light and Power Company voluntarily surrendered its right to serve the area in question, by virtue of its 1970 agreement with Poudre Valley. *Id.* A37-38.

In addition, by reason of the opinion of the Colorado Supreme Court in *City of Englewood v. Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967), it is clear that Poudre Valley didn't need to get a franchise from Greeley because it "has a franchise from the State by virtue of Colo. Rev. Stat. Section 50-5-1 (1963) (now Section 38-5-101) and the City is powerless to require a further franchise." In *Englewood* the Colorado Supreme Court also said that the telephone company—

> [*R*]*egardless of the validity of its original city franchise (a point which we need not decide), acquired what in law is a valid state franchise or right* by virtue of C.R.S. 1963, 50-5-1 and 8 (now Section 38-5-101 and 108). *This permitted it* not only to

> maintain its facilities in plaintiff's public ways, but also the right to construct and *operate additional ones therein without obtaining a city franchise.*

163 Colo. at 405, 431 P.2d at 42 (Parenthetical words and emphasis added by these *amici.*)

These *amici* regret that they are impelled to further challenge the legal basis for the Colorado Supreme Court's decision in this case, but the fact is that that court attempted to justify its holding by mistakenly embracing a number of extra-Colorado case decisions. In its opinion, reprinted in Appendices to Jurisdictional Statement A1, A17-18 that court stated:

> Our conclusion is consistent with the weight of authority from other jurisdictions that have addressed the issue . . . . the majority view is that a certificated rural electric association is permitted to continue serving the customers it had on the date of annexation, but that the association is not entitled to build or operate new facilities in the annexed area without first obtaining a municipal consent. *See Georgia Power Co. v. Altamaha Rural Elec. Membership Corp.*, 217 Ga. 376, 122 S.E.2d 250 (1961); *Missouri Public Serv. Co. v. Platte-Clay Elec Coop.*, 407 S.W.2d 883 (Mo. 1966); *Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.*, 253 N.C. 610, 117 S.E.2d 764 (1961); *Caddo Elec. Coop. v. State ex rel. Whelan*, 391 P.2d 234 (Okla. 1964); *City of Abbeville v. Aiken Elec. Coop.*, 287 S.C. 361, 338 S.E.2d 831 (1985); *State ex rel. Southern Gas and Elec. Co. v. Upshur Rural Elec. Coop.*, 156 Tex. 633, 298 S.W.2d 805 (1957); *Tri-City Elec. Ass'n v. City of Gillette*, 584 P.2d 995 (Wyo. 1978). (Two contra case citations omitted)

Four of the cases cited by the court in support of the aforequoted "conclusion" (*Altamaha*, Georgia; *Pee Dee*, North Carolina; *Caddo*, Oklahoma; and *Upshur*, Texas) turned solely on whether electric cooperatives were violating state statutory prohibitions of service to municipali-

ties in excess of stated population limits (acting *ultra vires*) or restricting REA loans for financing facilities for such service; no such legal considerations are even remotely involved here. Moreover, *in not a single one of these cases were the cooperatives regulated or holders of service area certificates of public convenience and necessity*! The other three cases (*Platte-Clay*, Missouri; *Aiken*, South Carolina; and *Tri-City*, Wyoming) turned upon statute law unique to those states.

The Colorado Supreme Court, in seeking justification from these extra-Colorado decisions, not only runs roughshod over the fundamental tenets of relevancy and this Court's holding in *Russell v. Sebastian*, 233 U.S. 195 (1914), which requires an analysis of the law of each state to determine the impairment issue; it bespeaks an almost desparate need to find *stare decisis* elsewhere in support of what, in view of *Englewood*, constitutes a gross disregard for *stare decisis* in Colorado.

We conclude with a statement that transcends—that would be, we think, appropriate with respect to—both this Proposition and Proposition Number Two on the Federal Supremacy Clause:

Poudre Valley not only has a right to serve in the contested area; it has a *legal obligation* to do so. The Appellant, like its nearly 1,000 counterparts throughout 46 of the United States, has accepted and successfully borne, to date, the costly and difficult burden of extending service throughout its service areas, most of which constitute hinterland whose human occupants are few and far between. What now the price for having so done? The predation of Greeley and Public Service Company of Colorado would not rob Poudre Valley of the paltry few consumers it now serves inside Greeley, but would attempt to rob Poudre Valley of the future consumers who predictably will locate in this contested area.

Public policy—both federal and state—surely militate against such a punitive price.

It beggars not only justice, reason and fairness, but logic itself, to essay any rational, much less constitutional, argument to support such a decimating policy. Colorado simply cannot constitutionally impair Poudre Valley's contract rights in the context of these facts.

Proposition Number Four

MINIMALLY, POUDRE VALLEY IS BEING DEPRIVED OF A VALUABLE PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW.

Under Proposition Number One, we argued that failure of the Colorado Supreme Court to afford Poudre Valley its day in court on its several federal defenses constituted a violation of due process, U.S. Const. amend. XIV. We here submit simply that, without regard to that Proposition, the result of the Colorado Supreme Court's decision is to deprive Poudre Valley of its state franchise granted by Colo. Rev. Stat. Section 38-5-101, and that this is also a violation of due process.

The Proposition is amply supported by the arguments made and cases cited in support of the three preceding Propositions, and we here simply incorporate the same accordingly.

CONCLUSION

We respectfully urge and request the Court to note probable jurisdiction and to entertain the appeal on the merits. Surely substantial federal questions are involved. REA is a half-century-plus success story—to this point—of having enabled nearly 100% of America's rural people to have access to good electric service at affordable rates. Only 10% of rural Americans had electric service at REA's birth in 1936.) [6] A common sense fact, which the District Court found, is that REA-financed electric cooperative's simply cannot feasibly serve the sparsely settled areas—in the western United States generally and in Poudre Valley's case particularly, many areas have fewer than one residence per mile of line—without being able to serve the more densely settled areas. Municipal annexation almost axiomatically acquires geographic areas that either already are or quickly are becoming densely settled, not only residentially but commercially and industrially. The Colorado Supreme Court's decision is arbitrary, unjust and unfair: It imposes financial punishment upon Poudre Valley for having done a good job; it jeopardizes REA's and Tri-State's investments by eroding their security; and, as the Weld County District Court found, it inhibits proper planning and construction for future consumer needs.

To what meaningful municipal end? The Colorado Supreme Court leaves intact Poudre Valley's lines already located on Greeley's public ways and streets (and no one even suggests that Poudre Valley is not otherwise subject to the proper exercise of Greeley's basic police power). It merely proscribes service from those lines to *new* consumers. How, then, are Greeley's municipal purposes in any way served by that edict? They are not, except in support of its co-Appellee's avarice to acquire

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[6] Agricultural Credit: Electric and Telephone; Rural Electrification Act of 1936 and Related Statutory Provisions; Agricultural Law, USDA Publication 303, Chapter 98, p. 98-5.

what it did not even risk funds to develop—the exclusive right to serve new premises locating in that portion of Poudre Valley's service area that Greeley has annexed. The result, measured in terms of municipal considerations, is as absurb as the means of reaching it are arbitrary.

We pray this Court to hear the appeal and reverse or, at least, remand accordingly.

Respectfully submitted,

JOHN J. CONWAY
4704 Harlan Street
Suite 500
Denver, CO 80212
(303) 458-7117
Attorney for Amici Curiae Colorado Rural Electric Association and Tri-State Generation and Transmission Association, Inc.

WILLIAM T. CRISP, II *
CRISP, DAVIS, SCHWENTKER, PAGE & CURRIN
Suite 225
Post Office Drawer 30489
Raleigh, NC 27622
(919) 787-4007
Attorney for All of the Named Amici Curiae

* Counsel of Record

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